(4) (5)

Nos. 85-5023 and 85-5024

In the Supreme Court of the United States

OCTOBER TERM, 1985

PATRICK GENE POLAND, PETITIONER

v.

ARIZONA, RESPONDENT

MICHAEL KENT POLAND, PETITIONER

v.

ARIZONA, RESPONDENT

ON WRITS OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 2, 1985
CERTIORARI GRANTED OCTOBER 7, 1985

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April 9, 1980 —Sentencing (First Trial).

April 9, 1980 —Notice of Appeal Filed.

April 13, 1982 —Decision of the Supreme Court of Arizona.

November 18, 1982 —Jury Verdict (Second Trial).

February 3, 1983 —Sentencing.

February 3, 1983 —Notice of Appeal Filed.

March 20, 1985 —Decision of Arizona Supreme Court.

April 10, 1985 —Motion for Reconsideration Filed.

May 8, 1985 —Denial of Motion for Reconsideration.

July 2, 1985 —Petition for Certiorari Filed, USSC.

October 7, 1985 —Certiorari Granted.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

No. 8850

STATE OF ARIZONA, PLAINTIFF

vs.

MICHAEL KENT POLAND, DEFENDANT

JUDGMENT AND SENTENCING

Time for passing Sentence having been set and coming on regularly this date, the Defendant is brought into court by the Sheriff; Wm. Lee Eaton, his counsel, being present; the Plaintiff appearing by and through A. Melvin McDonald, Jr. and W. Ronald Jennings, United States Attorneys for District Of Arizona and Steven J. Twist, Chief Assistant Attorney General. David W. Lundy, Court Reporter, reports the proceedings.

Comes now counsel McDonald for Plaintiff and requests the Court rule on the admission of Plaintiff's exhibit 1 previously taken under advisement at the Sentencing Hearing on January 11, 1983, prior to the Sentencing; counsel for Defendants objecting thereto and it is Ordered Plaintiff's exhibit 1 is admitted into evidence over said objections.

Thereupon, the Defendant, standing in court, the following Judgment and Imposition Of Sentence are pronounced and entered in the record, to-wit:

An Indictment having been returned by the Grand Jury of Yavapai County, Arizona, on April 26, 1979,

charging the Defendant with the crimes of Count I, Murder of Russell Dempsey in violation of A.R.S. 13-451, 13-452 as amended and 13-453(A) as amended; and Count II, Murder of Cecil Newkirk in violation of A.R.S. 13-451, 13-452 as amended and 13-453(A) as amended, Felonies, to which Indictment, the Defendant entered pleas of not guilty at Arraignment on May 8, 1979, and having put himself upon the country, and by that country, to-wit: by the verdict of twelve (12) good and lawful men and women, the Defendant was found guilty of the crime of Murder of Cecil Newkirk and further was found guilty of the crime of Murder of Russell Dempsey on November 18, 1982.

Comes now counsel for Defendant and makes statement to the Court on behalf of the Defendant.

No legal cause appearing to the Court why Judgment and Sentence should not now be pronounced, and by reason of the Verdict of the Jury, it is the Judgment of this Court that you, Michael Kent Poland, are guilty of the crime as charged in Count I of the Murder of Russell Dempsey on or about May 24, 1977, in violation of A.R.S. 13-451, 13-452 as amended and 13-453(A) as amended; and further you are guilty of the crime as charged in Count II of the Murder of Cecil Newkirk on or about May 24, 1977, in violation of A.R.S. 13-451, 13-452 as amended and 13-453(A) as amended, Felonies.

Comes now the Court and states the Aggravating and Mitigating Circumstances are as set forth in the Special Verdict.

Thereafter, the Court finds, pursuant to the provisions of A.R.S. 13-453(A) and 13-454(E), that two (2) of the Aggravating Circumstances exist as to the Defendant, Michael Kent Poland, and that there are no Mitigating Circumstances sufficiently substantial to call for leniency.

Therefore, as punishment for these crimes, it is Ordered that you, Michael Kent Poland, be sentenced to death afflicted by administering lethal gas. The execu-

tion shall take place within the limits of the State Prison at a time fixed by the Supreme Court if this conviction and sentence is affirmed.

The Clerk is Ordered to file a Notice Of Appeal from the Judgment and Sentence.

Further Ordered the Defendant is remanded to the custody of the Sheriff for transportation to the Arizona State Department Of Corrections.

DONE IN OPEN COURT THIS 3rd DAY OF FEBRUARY, 1983.

/s/ Paul G. Rosenblatt
Judge of the Superior Court
Division I

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

No. 8850

STATE OF ARIZONA, PLAINTIFF

vs.

PATRICK GENE POLAND, DEFENDANT

JUDGMENT AND SENTENCING

Time for passing Sentence having been set and coming on regularly this date, the Defendant is brought into court by the Sheriff; John C. Stallings, his counsel, being present; the Plaintiff appearing by and through A. Melvin McDonald, Jr., and W. Ronald Jennings, United States Attorneys for District Of Arizona and Steven J. Twist, Chief Assistant Attorney General. David W. Lundy, Court Reporter, reports the proceedings.

Comes now counsel McDonald for Plaintiff and requests the Court rule on the admission of Plaintiff's exhibit 1 previously taken under advisement at the Sentencing Hearing on January 11, 1983, prior to the Sentencing; counsel for Defendants objecting thereto and it is Ordered Plaintiff's exhibit 1 is admitted into evidence over said objections.

Thereupon, the Defendant, standing in court, the following Judgment and Imposition Of Sentence are pronounced and entered in the record, to-wit:

An Indictment having been returned by the Grand Jury of Yavapai County, Arizona, on April 26, 1979, charging

the Defendant with the crimes of Count I, Murder of Russell Dempsey in violation of A.R.S. 13-451, 13-452 as amended and 13-453(A) as amended; and Count II, Murder of Cecil Newkirk in violation of A.R.S. 13-451, 13-452 as amended and 13-453(A) as amended, Felonies, to which Indictment, the Defendant entered pleas of not guilty at Arraignment on May 8, 1979, and having put himself upon the country, and by that country, to-wit: by the verdict of twelve (12) good and lawful men and women, the Defendant was found guilty of the crime of Murder of Cecil Newkirk and further was found guilty of the crime of Murder of Russell Dempsey on November 18, 1982.

Comes now the Defendant and files with the Court three (3) letters written on his behalf.

Comes now Defendant and files with the Court Application For Writ Of Habeas Corpus; and further makes statement to the Court on his own behalf and further renews his Motion To Dismiss his Court-appointed counsel.

Comes now counsel for Defendant and makes statement to the Court on behalf of the Defendant.

No legal cause appearing to the Court why Judgment and Sentence should not now be pronounced, and by reason of the Verdict of the Jury, it is the Judgment of this Court that you, Patrick Gene Poland, are guilty of the crime as charged in Count I of the Murder of Russell Dempsey on or about May 24, 1977, in violation of A.R.S. 13-451, 13-452 as amended and 13-453(A) as amended; and further that you are guilty of the crime as charged in Count II of the Murder of Cecil Newkirk on or about May 24, 1977, in violation of A.R.S. 13-451, 13-452 as amended and 13-453(A) as amended, Felonies.

Comes now the Court and states that the Aggravating and Mitigating Circumstances are as set forth in the Special Verdict.

Thereafter, the Court finds, pursuant to the provisions of A.R.S. 13-453(A) and 13-454(E), that three (3) of

the Aggravating Circumstances exist as to the Defendant, Patrick Gene Poland, and that there are no Mitigating Circumstances sufficiently substantial to call for leniency.

Therefore, as punishment for these crimes, it is Ordered that you, Patrick Gene Poland, be sentenced to death afflicted by administering lethal gas. The execution shall take place within the limits of the State Prison at a time fixed by the Supreme Court if this conviction and sentence is affirmed.

The Clerk is Ordered to file a Notice Of Appeal from the Judgment and Sentence.

Further Ordered the Defendant is remanded to the custody of the Sheriff for transportation to the Arizona State Department Of Corrections.

DONE IN OPEN COURT THIS 3rd DAY OF FEBRUARY, 1983.

/s/ Paul G. Rosenblatt
Judge of the Superior Court
Division I

SUPERIOR COURT OF ARIZONA
YAVAPAI COUNTY

No. 8850

STATE OF ARIZONA, PLAINTIFF

vs.

MICHAEL KENT POLAND and
PATRICK GENE POLAND, DEFENDANTS

STATE'S MEMO IN RE AGGRAVATING CIRCUMSTANCES

The State of Arizona, by and through the Yavapai County Attorney, Billy L. Hicks, sets forth the following in regard to the aggravating circumstances herein. It is submitted that the existence of the two aggravating circumstances herein call for the Court to impose the death penalty inasmuch as there are no mitigating circumstances sufficiently substantial to call for leniency. The memorandum of points and authorities supports this position.

Dated this 10th day of March, 1980.

/s/ Billy L. Hicks
BILLY L. HICKS
Yavapai County Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

A. *The defendants committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.*

There is really no Arizona Appellate Court construction on this point. The State submits that the language is clear and unambiguous. The words are in common usage with the meanings well-fixed and generally understood. A plain reading of the statute certainly encompasses murder committed in connection with a robbery or other profit-motivated offense. The following cases have so held: (1) *State v. Snow*, 383 A.2d 1385, 1388 (1978) interpreting the identical language in a homicide statute; (2) *Raulerson v. State*, Fla., 358 So.2d 826 (1978); (3) *Young v. State*, 237 Ga. 851, 230 S.E.2d 287 (1926); (4) *Neal v. State*, Ark. 531 S.W.2d 17, 21 (1976). The Court should give the wording in the statute its plain meaning.

In *State v. Holsinger*, 115 Ariz. 89, 98, 563 P.2d 888 (1977), the only Arizona case known to have discussed the section, the section was applied to a murder motivated by a contemplated inheritance but the Court did not discuss the intent of the statute.

In the case at bar there was a contemplated financial gain from the robbery of the Purolator truck. The key portion of the sub-section of the statute pertaining to this case is "*in expectation of the receipt*" of anything of pecuniary value. Certainly there was an expectation in this instance to receive money after the robbery. The sub-section applies to this case.

B. *The defendants committed the offense in an especially heinous, cruel, or depraved manner.*

In the Arizona Supreme Court's clearest statement of the applicable test that should be applied to this subsection the Court has agreed that the commission of the

crime must be such as to "set defendant's acts apart from the norm of first degree murder". *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979); *State v. Lujan*, Ariz., 604 P.2d 629 (1979). Where the manner of inflicting death has been by common gunshot or stabbing, the Court has consistently declined to find the aggravating factor. *See, State v. Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978); *State v. Brookover, supra*; *State v. Lujan, supra.*

In the instant case it is submitted that the method of causing death does indeed "set the defendant's acts apart from the norm". The placing of the victims into the canvas bags and drowning of them is a death brought about in an especially heinous or depraved manner when compared to a *mere* gunshot, stabbing, or other type of first degree murder act. This act is outside the scope of the usual type of killing.

A ruthless disregard for human life was evident when the Arizona Court upheld the death penalty in *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), where the defendant set fire to the bedroom wherein his two infant daughters were sleeping and then returned to his bedroom and waited while they were killed.

A ruthless disregard for human life is also evident in this case. The robbery was already completed. The victims were then placed into the bags and the bags secured leaving the victims to a slow, agonizing death at the bottom of Lake Mead.

Based on the above, it is submitted that the two subsections of the death penalty statute *do* apply and that there are no mitigating factors sufficiently substantial to call for leniency.

Dated this 10th day of March, 1980.

/s/ Billy L. Hicks
BILLY L. HICKS
Yavapai County Attorney

SUPERIOR COURT OF THE STATE OF ARIZONA
COUNTY OF YAVAPAI

[Title Omitted in Printing]

TRANSCRIPT OF FIRST SENTENCING—APRIL 9, 1980

* * * *

[1] THE COURT: This is Cause No. 8850, State of Arizona versus Michael Kent Poland and Patrick Gene Poland. This is the time set for sentencing.

Is the State ready?

MR. HICKS: Yes, sir. Billy Hicks appearing for the State, and we are ready.

THE COURT: Are the defendants ready?

MR. EATON: Defendant Michael Poland is ready.

MR. STALLINGS: Defendant Patrick Poland is ready, your Honor.

THE COURT: Would you come forward, please.

Is your true and correct name Michael Kent Poland?

MICHAEL POLAND: Yes, it is.

[2] THE COURT: And is your true and correct name Patrick Gene Poland?

PATRICK POLAND. Yes, sir.

THE COURT: Gentlemen, you were charged by the State of Arizona with two counts; one, that on or about May 24th, 1977, you murdered Russell Dempsey. In Count Two that on or about May 24th, 1977, you murdered Cecil Newkirk. On November 24th of 1979 you were found guilty of these charges by a jury.

Do you have anything to say or cause to show why sentence should not now be pronounced?

MR. EATON: Your Honor, we have already exercised our right of elocution in our previous proceedings, and we have nothing else to state.

THE COURT: Mr. Stallings?

MR. STALLINGS: I have nothing to add to the Court, Your Honor.

THE COURT: Michael?

MICHAEL POLAND: I believe the Court knows my feelings about this.

THE COURT: Patrick?

PATRICK POLAND: We didn't do it.

THE COURT: No cause appearing to the Court and by reason of the findings of the Jury, it is the judgment of this Court that you are guilty of the crime of the murder of [3] Russell Dempsey on May 24th, 1977, in violation of ARS Sections 13-451, 13-452, as amended and 13-453(A), as amended, and guilty as charged in Count Two that on or about May 24th, 1977, you both murdered Cecil Newkirk in violation of ARS Sections 13-451, 13-452, as amended and 13-453(A), as amended.

I would like to state at the outset that this Court was offended by the prosecutorial discretion to not prosecute these gentlemen in Federal Court. They were charged under the laws of the United States of America. The Federal prosecutor did not see fit to prosecute under those laws; he should have, or if he did not like those laws, he should attempt to have those laws changed. The most significant example of this abuse of discretion occurred when Herod turned to Pontius Pilate to have Jesus executed under the laws of Rome; there being no such law available to the priests. I think there was an abuse; on the other hand, it is as the Court understands the law, permissible.

I would like to extend the analogy beyond what I have already mentioned because of course in this case the State's case was very strong as to your guilt.

PATRICK POLAND: Us?

THE COURT: I know in a society of television we like to think that somewhere there is a great camera that is able to replay instantly everything that has happened; we have become accustomed to that in our daily lives. Of course, it [4] doesn't happen that way. The case was strong. The evidence did fit together very neatly and was in fact supported by your testimony that you were engaged in the sort of Robin Hood series of cr ninal activities that was totally unbelievable.

The difficulty with the case, of course, is the fact that you have been good, solid products of middle America, so to speak; nothing psychopathic in your background. You are not the victims of broken homes, obviously loving and caring for your families and your families for you; this is not the typical example of derelicts who for unknown reasons take out their vengeance on society.

I think that Mr. Eaton in his argument at the Sentencing Hearing dramatically demonstrated the backgrounds in a way that the Court has never had the opportunity to observe in any court, in my own Court or on the Legislative floor; truly a remarkable job of a demonstration of the difficulties involved in this case.

The Court has prepared a special verdict as required by law and delivering copies to counsel and to the prosecutor. Without reading the entire special verdict, suffice it to say that the Court finds one aggravating circumstance and one alone as permitted under the provisions of ARS Section 13-454(E), and that aggravating circumstance is that these killings were especially heinous, cruel and depraved. Set forth in a more [5] detailed analysis of this aggravating circumstance, it goes beyond the fact the killings were carefully planned and cold-blooded. The Arizona Supreme Court has spoken to us most recently in State versus Madsen that this is not sufficient. Had the murders taken place at the scene, it would not likely be set aside as the normal first degree murder, but that was not the evidence. The evidence more clearly supports the guidelines of State versus

Knapp, and in that case it was found by the trial court and by the Supreme Court that the circumstances were beyond the norm and especially heinous, cruel and depraved.

As far as mitigating circumstances are concerned, the Court finds none of the statutory mitigating circumstances, but the Court does find mitigating circumstances that the defendants' previous reputation for good character is a mitigating circumstance, and that the close family ties that exist between the defendants and their families and their children is also a mitigating circumstance, and the Court has considered the ages of the defendants.

Pursuant to the provisions of ARS Sections 13-453(A) and 13-454(E), the Court finds that one of the aggravating circumstances exists and that there are no mitigating circumstances substantial to call for leniency.

Therefore, as punishment for this crime, it is Ordered that you both be sentenced to death afflicted by [6] administering lethal gas. The execution shall take place within the limits of the State Prison at a time fixed by the Supreme Court if these convictions and sentences are affirmed.

The Clerk is Ordered to file a Notice of Appeal from these judgments and sentences, and the defendants are remanded to the custody of the Sheriff for delivery to the Department of Corrections.

Anything for the record?

MR. EATON: Nothing further, your Honor.

MR. HICKS: Nothing from the State, your Honor.

THE COURT: Court stands at recess.

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

[Title Omitted in Printing]

SPECIAL VERDICT

Pursuant to the requirements of A.R.S. § 13-454 C; Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2955; 57 L.Ed 2d 973 (1978); and State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), this court returns this special verdict of its findings of the existence or non-existence of aggravating circumstances set forth in § 13-454E and of any mitigating circumstances.

AGGRAVATING CIRCUMSTANCES

The only information which has been considered by this court relevant to any of the aggravating circumstances set forth in § 13-454E is that received in evidence at the trial.

A. The court considers the statutory circumstances as follows:

1. The court finds the aggravating circumstance in § 13-454 E(1) is not present.

2. The court finds the aggravating circumstance in § 13-454 E(2) is not present.

3. The court finds the aggravating circumstance in § 13-454 E(3) is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00.

This, then, would be an aggravating circumstance.

4. The court finds the aggravating circumstance in § 13-454 E(4) is present.

The cause of death was by drowning. The victims were kidnapped on I-17 in southern Yavapai County, they were transported to Lake Mead. At some time they were placed in canvas bags, taken onto the lake and placed in the water to drown. Such killings were especially heinous, cruel, and depraved.

In applying this provision, the Arizona Supreme Court has said that these words have meanings that are clear. The evidence shows that the killings were carefully planned and cold blooded. This, by itself, is not sufficient, however, as pointed out in St. v. Madsen —— Ariz ——, —— P2d —— (filed March 26, 1980) and had the murders taken place at the scene on I-17 they would not likely have been set aside from the norm of first degree murder.

But the facts show the murders were shockingly evil, insensate, and marked by debasement.

The Defendants argue that the State has not shown the victims suffered pain, or that they were not drugged.

The guidelines of State v. Knapp, 114 Az. 531, 562 P2d 704 closely reach this case. In *Knapp* the victims were incinerated. The autopsy shows there was carbon monoxide poisoning as well, a painless death. The nature of the killing itself is sufficient to set it aside from the norm. Placing victims in canvas bags and dropping them to a slow and terrifying death is grossly bad, sadistic and perverse.

MITIGATING CIRCUMSTANCES

All information relevant to any mitigating circumstances, including, but not limited to, those set forth in § 13-454 (F), contained in the presentence report, presented at the sentencing hearing, and received in evidence at the trial of the defendants has been considered by the court.

A. The court considers the mitigating circumstances as follows:

1. The defendants' capacity to appreciate the wrongfulness of their conduct or to conform to the requirements of law was not significantly impaired. The mitigating circumstance of § 13-454(F)(1) is not present.

2. The defendants were not under unusual and substantial duress. The mitigating circumstance of § 13-454(F)(2) is not present.

3. There is no evidence or information of any kind to permit the court to find the defendants' participation in the murders was relatively minor. The mitigating circumstance of § 13-454(F)(3) is not present.

4. There is no evidence or information of any kind to permit this court to find that the defendants could not reasonably foresee that their conduct in the course of the commission of the offense for which they were convicted would cause or would create a grave risk of causing death to another person.

The mitigating circumstance of § 13-454(f)(4) is not present.

5. The defendants previous reputation for good character is a mitigating circumstance.

6. The close family ties that exist between the defendants, their families, and their children is a mitigating circumstance.

7. The court has considered the ages of the defendants. Michael Poland is 40 years old. Patrick Poland is 30 years old.

All references in this Special Verdict to the Arizona Revised Statutes are to the sections of those statutes as they were numbered at the time of the commission of the offense and prior to October 1, 1978.

DATED this 9th day of April, 1980.

/s/ Paul G. Rosenblatt
PAUL G. ROSENBLATT
Presiding Judge—Division One

SUPREME COURT OF ARIZONA

[Title Omitted in Printing]

EXCERPTS OF ARGUMENT FROM STATE'S ANSWERING BRIEF

* * * *

ARGUMENT

VIII

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING APPELLANTS TO DEATH.

Appellants argue that there was insufficient evidence to support the trial court's finding of an aggravating circumstance pursuant to former Ariz. Rev. Stat. Ann. § 13-454(E)(6), and that therefore the trial court erred in sentencing appellants to death. In death penalty cases, this Court must make an independent review of all the facts to determine the presence or absence of aggravating and mitigating circumstances. *State v. Bishop*, —— Ariz. ——, 622 P.2d 478 (1980). In reviewing the evidence, this Court must view the facts in the light most favorable to upholding the finding of the trial court, *State v. Watson*, 120 Ariz. 441, 447-48, 586 P.2d 1253, 1259-60 (1978), *cert. denied*, 440 U.S. 924 (1979); *State v. Ceja*, 115 Ariz. 413, 415-16, 565 P.2d 1274, 1276-78, *cert. denied*, 434 U.S. 975 (1977); *see State v. Smith*, 123 Ariz. 231, 242-43, 599 P.2d 187, 198-99 (1979). This Court must then make an independent review of the aggravating and mitigating circumstances to determine whether the death penalty should be imposed. *State v. Watson*, No.

3089-2 (Ariz. Sup. Ct., Apr. 19, 1981). Appellee submits that an independent review of the evidence supports the trial court's imposition of the death penalty.

In its special verdict of April 9, 1980, the trial court found an aggravating circumstance pursuant to former Ariz. Rev. Stat. Ann. § 13-454(E)(6). The trial court also made the following finding:

> The court finds the aggravating circumstance in § 13-454 E(3) [sic] is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00.

(Special Verdict filed Apr. 9, 1980.) This Court has held that Ariz. Rev. Stat. Ann. § 13-454(E)(5) is not limited to "hired gun" situations, but applies also to murders committed for financial gain. *State v. Clark*, supra. The trial court did not have the benefit of the holding in *State v. Clark*, supra, when it filed its special verdict, and therefore it made a conditional finding on this particular circumstance and did not rely upon it in determining sentence. Appellee submits that this Court, in making its independent review, can and should hold that the circumstances of this case warrant the finding of an aggravating circumstance pursuant to Ariz. Rev. Stat. Ann. § 13-454 (E)(5). The cause of the murders of Dempsey and Newkirk was the expectation of financial gain, in the form of the money in the Purolator van.

In their opening brief, appellants claim that imposition of the death penalty was improper because the state failed to prove the existence of the aggravating circumstance beyond a reasonable doubt, as required by *State v. Jordan*, 126 Ariz. 283, 614 P.2d 283, *cert. denied*, —— U.S. ——, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). Specifically, appellants assert that the state failed to carry its burden of proving that the murders were committed in an especially heinous, cruel or depraved manner within the mean-

ing of Ariz. Rev. Stat. Ann. § 13-454(E)(6). The presence of any one of the three elements set forth in the above subdivision is sufficient to constitute an aggravating circumstance. *State v. Bishop*, supra. This Court has had several occasions to discuss the meanings of the terms used in Ariz. Rev. Stat. Ann. § 13-454(E)(6). The aspect of cruelty involves the pain and the mental and physical distress visited upon the victims, while the terms heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions. *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980).

Appellants claim that there is nothing in the record to establish that the victims suffered pain. This is not so. As the trial court stated in its special verdict, placing the guards in canvas bags and leaving them to a slow and terrifying death is sadistic and perverse. Appellants cite *State v. Lujan*, 124 Ariz. 365, 604 P.2d 629 (1979), in support of their position that the killings of the guards were not exceptionally cruel. The victim in *Lujan* died from a single stab wound. That type of death cannot be compared to death by drowning. Death by drowning is more comparable to the death by incineration that this Court found to be exceptionally cruel in *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908 (1978). An additional element of cruelty in this case is the mental suffering of the guards. Appellants held the guards prisoner for an extended period before placing them in canvas bags prior to their deaths. There can be no doubt that Dempsey and Newkirk suffered mental anguish, and it may be inferred that throughout their imprisonment they were uncertain about their ultimate fate. *Cf. State v. Steelman*, 126 Ariz. 19, 612 P.2d 475, *cert. denied*, —— U.S. ——, 101 S.Ct. 287, 66 L.Ed.2d 141 (1980). The evidence establishes that appellants murdered their victims in an especially cruel manner.

Appellants also argue that the record does not support a finding that the murders were committed in an espe-

cially heinous or depraved manner. Since no one witnessed the killings, appellants assert, it is impossible to establish state of mind at the time of the killings. Appellants' mental states and attitudes, like their guilt, are established by circumstantial evidence. Words and actions reflect a person's state of mind. *State v. Ceja*, supra, 126 Ariz. at 39, 612 P.2d at 495. The deaths of Dempsey and Newkirk are appellants' handiwork, and the manner of those deaths reflects cold, calculating and merciless minds. This is not speculation, as appellants label it, but rather the drawing of reasonable inferences from the evidence. Placing two living human beings into canvas bags and dropping them into a lake to drown is conduct that is shockingly evil and marked by debasement. Therefore, the evidence establishes that appellants murdered the guards in a heinous or depraved manner.

Appellants raise the cause of death issue in an attempt to attack the trial court's finding of an aggravating circumstance pursuant to Ariz. Rev. Stat. Ann. § 13-454 (E)(6). As set forth in the preceding argument, the evidence fully supports the conclusion that the cause of the guards' deaths was drowning. Further, appellants contend that it is possible that the guards might have been drugged prior to being placed in the water, and that the killings were thus "as humane as any killing can be." (Appellants' Opening Brief, at 83.) There was no evidence of drugs in either of the bodies. (R.T. of Oct. 31, 1979, at 24, 37.) In any event, any alleged drugging of the guards would only tend to reduce the cruelty element, and would not make appellants' conduct any less heinous or depraved. Appellee submits that society does not share appellants' idea of "humane" killings.

In conclusion, the record establishes the existence of aggravating circumstances pursuant to Ariz. Rev. Stat. Ann. § 13-454(E)(5) and (6). There were no mitigating factors sufficiently substantial to call for leniency. Therefore, the trial court properly imposed the death penalty.

CONCLUSION

For all of the above-stated reasons, appellee respectfully requests that the judgment and sentence of the lower court be affirmed.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

/s/ William J. Schafer III
WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

/s/ Gerald R. Grant
GERALD R. GRANT
Assistant Attorney General

Attorneys for APPELLEE

SUPREME COURT OF ARIZONA

[Title Omitted in Printing]

EXCERPTS OF ARGUMENT FROM APPELLANTS' OPENING BRIEF

* * * *

VIII

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE TRIAL COURT'S FINDING THAT THE OFFENSE IN THE INSTANT CASE WAS COMMITTED IN AN ESPECIALLY HEINOUS, CRUEL AND DEPRAVED MANNER AS CONTEMPLATED BY THE LANGUAGE OF A.R.S. § 13-454(E)(6).

In sentencing the Appellants to death, the trial court in its Special Verdict found the existence of the aggravating circumstance set forth in A.R.S. § 13-454(E)(6), i.e., that the offense was committed in an especially heinous, cruel and depraved manner. It is the Appellants' contention that there was insufficient evidence to support this finding and that their death sentences are therefore improper.

This Court in *State v. Jordan*, 614 P2d 825 (1980), held that the State must prove the existence of aggravating circumstances beyond a reasonable doubt. For the reasons set forth hereafter, it is apparent that proof beyond a reasonable doubt of the existence of the aggravating circumstance set forth in A.R.S. § 13-454(E)(6) was not demonstrated.

In *State v. Lujan*, 604 P2d 629 (1979), this Court thoroughly examined and analyzed the application of A.R.S. § 13-454(E)(6) and dictated specific mandates concerning its applicability. In *Lujan*, supra, the defendant was sentenced to death following a finding by the trial court that the defendant committed the crime in an especially heinous, cruel or depraved manner. After an examination of the lower court record, this Court reversed the trial court and held that the aggravating circumstance did not exist. The defendant's sentence was therefore reduced to life imprisonment.

Factually, in *Lujan*, supra, the victim was stabbed in the stomach by the defendant after he had been rendered helpless by an accomplice. The victim died several hours later from the stab wound. In determining whether the aggravating factor existed under the factual setting of the *Lujan* case, the Court re-emphasized that the words "heinous, cruel, or depraved" have well defined, specific meanings. The Court, therefore, set forth the following definition for future guidance:

> "The words 'heinous, cruel or depraved' have meanings that are clear to a person of average intelligence and understanding. Webster's Third New International Dictionary defines them as follows:
>
> 'heinous: hatefully or shockingly evil; grossly bad.'
> 'cruel: disposed to inflict pain especially in a wanton, insensate or vindictive manner: sadistic.'
> 'depraved: marked by debasement, corruption, perversion or deterioration.' "

The Court then stressed that under the Arizona statute, a killing must not be *merely* heinous, cruel or depraved to warrant the finding of the aggravating circumstance. Instead, a much higher degree of culpability must exist—the killing must be *especially* heinous, cruel or depraved.

The Court then proceeded to discuss at length the specific findings that *must be established by the record* in order for the aggravating factor to exist. The Court's meaning and intention is best understood by direct quotation from the opinion.

> "For a killing to be especially cruel, the perpetrator must senselessly or sadistically inflict great pain on his victim. An example of exceptional cruelty can be found in *State v. Knapp*, supra, where defendant set fire to the room in which his two infant daughters were asleep and caused them to be burnt to death. We find nothing in the record to establish that the victims suffered pain, and the commission of the offense in this case cannot, therefore, be considered especially within the intent of A.R.S. § 13-454(E)(6).
>
> In determining whether a murder has been committed in an especially heinous or depraved manner, we must necessarily consider the killer's state of mind at the time of the offense. This state of mind may be shown by his behavior at or near the time of the offense. Thus, we have found those additional factors which make murder especially heinous or depraved where the killer not only shot to death the victim of a robbery but also shot two innocent bystanders, killing one, all for no discernible reason. *State v. Blazak*, 114 Ariz 199, 560 P2d 54 (1977) as discussed in *State v. Knapp*, supra, and *State v. Ceja*, 115 Ariz 413, 565 P2d 1274, *cert. denied*, 434 U.S. 975, 98 S.Ct. 533, 54 L.Ed.2d 467 (1977). In *Knapp*, we characterized the killing of the bystander in *Blazak*, as "particularly unnecessary and conscienceless." 114 Ariz at 543, 562 P2d at 716.
>
> We have also considered acts done immediately after the actual killing to determine the murderer's mental state at the time of the killing. We have found an

> especially heinous or depraved manner of commission where the defendant murdered two victims in a "barrage of violence," continuing to shoot and abuse his victims even after he had killed them. *State v. Ceja*, 115 Ariz at 417, 565 P2d at 1278."

Application of the dictates of *Lujan*, supra, to the instant case leads undeniably to the conclusion that the *record* does *not* support a finding that the crime herein was committed in an especially cruel, heinous or depraved manner.

The killing of the guards cannot be found to be "especially cruel" since there is nothing in the record to establish that the victims suffered pain. There is no showing on the record that the perpetrator of the crime senselessly or sadistically inflicted great pain upon the victims. In this regard, it is important to recognize that one cannot assume the existence of pain from the act committed. For example, in *Lujan*, the Court refused to find that the victim suffered pain merely because he had been stabbed to death. In the instant case, there is a total void of evidence as to whether the guards' death was painful. All we know is that the guards' bodies were found floating in Lake Mead three to four weeks after their disappearance. We have nothing but mere speculation or conjure to enlighten us as to the circumstances surrounding the actual death of the victims. Likewise, the record in the instant case *cannot* support a finding that the crime was committed in an especially heinous or depraved manner. In this connection, *Lujan* has mandated that this finding must be based upon the killer's state of mind as shown by his behavior at or near the time of offense. The state of record in the instant case absolutely precludes such a finding since there is no evidence whatsoever in the record to show the killer's state of mind at the time of the offense.

This finding is initially impossible since we don't even know when the offense was committed. The bodies sur-

faced in Lake Mead three to four weeks after the robbery of the Purolator van. Dr. Green could not state with accuracy the length of time the bodies had been in the water. Since the bodies surfaced at different times, we do not even know for a fact that the bodies were placed in the water at the same time. In essence, it is impossible to make the finding of an especially heinous or depraved killing without direct evidence to show precisely what the perpetrator of the crime did and how he acted at or near the time the offense was committed. In the instant case, since no on actually witnessed the killings (whenever or however they occurred), it is impossible for the record to establish the killer's state of mind at that undetermined point in time when the guards actually met their deaths.

The State in its sentencing memorandum chose to ignore the clear requirements of *Lujan*, supra and instead has chosen to continue to ignore facts and to engage in the same speculation that has characterized its presentation throughout the course of this case.

For example, the State chose to ignore the fact that drowning is a diagnosis of exclusion based primarily on the fact that the guards were found in the water without other visible signs of traumatic injury capable of causing death. This finding gives us no insight whatsoever as to the facts surrounding the placement of the bodies in the water or as to the condition of the guards at the time of the placement.

Additionally, the State chose to ignore the fact that Guard Dempsey suffered from serious heart disease at the time of the robbery. Dr. Green diagnosed that Dempsey suffered from coronary arterioschlerosis with thrombosis. The autopsy report states that Dempsey came to his death as a result of "undetermined cause." On cross examination, Dr. Green testified that he could not state as a reasonable medical certainty that Dempsey did not die of a heart attack. He further testified that if Demp-

sey did die of a heart attack, he could not say when the attack would have occurred. The record thus gives rise to the distinct possibility that Guard Dempsey died of a heart attack and that his body was merely disposed of in Lake Mead at a later date. In view of these facts, the evidence is insufficient as a matter of law to prove beyond a reasonable doubt that Dempsey was murdered. In any event, the date of the record is certainly insufficient to support a determination of an especially cruel, heinous or depraved killing.

Finally, we do not now and never will know the condition of the guards at the time they entered the water. As is established by the affidavit filed at the Aggravation-Mitigation hearing, Dr. Green has stated that it is possible that both individuals could have been drugged at some time before they were placed in the water. If this was the case, this killing was as humane as any killing can be. In any event, the possibility that the guards were drugged, which has not been disproved by the State, precludes the finding that the guards were killed in an especially cruel, heinous or depraved manner.

In conclusion, it is respectfully submitted that the specific findings mandated by *State v. Lujan* have not been established on the record in this case. The trial court was, therefore, precluded from finding that the killings herein were carried out in an especially heinous, cruel or depraved manner as contemplated by A.R.S. § 13-454 (E) (6) and the imposition of the death penalty was improper.

CONCLUSION

The trial court erred in not granting Appellants' Motion for New Trial for the reasons hereinbefore set forth. The trial court also erred in imposing the death sentence for the reason that there was insufficient evidence to support the aggravation-mitigation portion of this case.

Therefore, it is respectfully submitted that this case should be remanded for new trial.

Respectfully submitted,

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SUPREME COURT OF ARIZONA

[Title Omitted in Printing]

EXCERPTS OF ARGUMENT FROM APPELLANTS' REPLY BRIEF

* * * *

ARGUMENT V

The Defendants will not reiterate in this Reply all of the reasons advanced in their Opening Brief for their position that insufficient facts exist to justify the finding that the murders in this case were committed in an especially heinous, cruel and depraved manner. The arguments previously advanced have clearly made their point and need no further elaboration. What, however, does not further consideration is the Appellee's contention that A.R.S. § 13-454(E)(5) would apply even if these murders did not come within the definition of A.R.S. § 13-454(E)(6).

As the Appellee points out, the trial Court did not find the existence of the aggravating circumstance enumerated in A.R.S. § 13-454(E)(5) because it felt that the legislature did not intend the statutory language to apply to facts such as those present in the instant case. Further, the Appellee points out that at the time of sentencing in this case, *State v. Clark*, 126 Ariz 428, 616 P2d 888 1980), had not yet been decided and that had *Clark, supra*, been available, it would supply support for the finding that this aggravating circumstance is present in the instant case. Conceptually, the Appellants find much lacking in this approach. First, the trial Court did not find the existence of this aggravating circumstance and it would seem now somehow improper to find that it

does exist because of perhaps improvident language in the Special Verdict. Secondly, it remains the Appellants' contention, as advanced below, that the plain reading of the statutory language of A.R.S. § 13-454(E)(5) does not lead one to the conclusion that it was meant to cover the type of situation now being addressed on appeal.

The Appellants are mindful of the holding of *State v. Clark*, *supra*, with respect to the issue presented by A.R.S. § 13-454(E)(5), but they contend that Justice Gordon's dissent in that case more accurately touches the essence of this matter. Did the Legislature intend the statutory language to cover certain broad categories of criminal activity or was it simply intended for the statute to cover the more limited "murder-for-hire" situations? The Appellants believe the latter to be the case because the Legislature could have easily employed broader language if they intended the former to be the case. Indeed, other jurisdictions have drafted legislation which does appear to cover the broad spectrum of activity which this Court said in *Clark* was covered by our statutory provisions. The Appellants have compiled a list of the various states' statutes having relevance to this issue which is set forth in the appendix to this Reply Brief and what is significant about the language employed throughout the United States is the apparent degree to which certain states have made it clear that the range of offenses to be considered is broad irrespective of the relationship which existed or did not exist between the defendant and the victim. A real difference exists in the approach toward what is deemed to be an aggravating circumstance and what is not and that difference is reflected in the language employed. At least two jurisdictions, Alabama and Nebraska, have indicated that under their provisions the type of conduct now under examination would not be treated as an aggravating circumstance because the language employed by their legislatures was not precise enough to cover these situations. *Cook v. State*, 369 So.2d 1751 (Ala. 1979), *Ashlock v. State*, 367 So.2d 560 (Ala. CR. App., 1979), *State v. Rust*, 197 Neb

528, 250 NW2d 867 (1977). Other jurisdictions have found their language sufficient to cover a broader type of murder activity but only because the language employed condemned the "murder for pecuniary gain." *State v. Snow*, 383 A2d 1385 (Me. 1978); *Raulerson v. State*, 358 So.2d 826 (Fla. 1978); *Young v. State*, 237 Ga. 851, 230 SE2d 287 (1976); *Neal v. State*, 531 SW2d 17 (Ark. 1976). This is not the case in Arizona, although at one point in time it appears our Legislature did consider employing a broad definition "that the murder was committed for pecuniary gain" as an aggravating circumstance.

It is very difficult to ascertain what reasoning on the part of the Legislature led to the final adoption of the language of A.R.S. §§ 13-454(E)(4) and (E)(5) because no minutes of the legislative hearings were apparently kept if any such hearings were held. However, the Appellants have been able to find what appears to be an early draft of the death penalty statute, Senate Bill 1005, a copy of which is set forth in the Appendix to this Brief. As an examination of S.B. 1005 discloses, very broad language was employed in that proposed legislation that would have made the murder committed for pecuniary gain an aggravating circumstance. As Justice Gordon pointed out in his dissent to *State v. Clark, supra*, this type of language would squarely cover the activity of the instant case. However, after the issuance of S.B. 1005 and prior to the final adoption of the death penalty provisions, a change in the language employed by the Legislature occurred. The change in language was a significant one in that the much broader "murder was committed for pecuniary gain" provision was jetisoned in favor of the dual provisions now found to exist in our law in §§ 13-454(E)(4) and (E)(5).

The language which now appears in the statutory provisions now under consideration was apparently modeled in large part after a proposed U.S. House of Representative Death Penalty Bill which was never enacted by Congress. That proposal which is also set forth in the Ap-

pendix used language identical to that which is now found in A.R.S. §§ 13-454(E)(4) and (E)(5). The significance of the differences in the approaches found in S.B. 1005, the proposed federal legislation and the existing statutory provisions of §§ 13-454(E)(4) and (E)(5), clearly must be found in the narrowing of the categories of situations to be considered as aggravating circumstances. There is no doubt that S.B. 1005 in its inception would have covered the factual situation now under review but S.B. 1005 was never enacted. Instead, the more precise and narrowing language of the proposed federal legislation was adopted and in so doing the Legislature clearly intended that the statutory provisions cover only the exclusive situations in which the murder was committed for hire, or for the purpose of gaining insurance or inheritance proceeds. If the intent of the Legislature was that a broad category of homicides was to be ensnared in the language of §§ 13-454(E)(4) and (E)(5) that goal could have been accomplished by using the language of S.B. 1005. As was indicated that was not done, and for that reason it cannot be said that the blanket condemnation previously suggested by the Court in *State v. Clark, supra*, and by the Appellee in its Brief, is implicit in the language finally adopted by the Legislature. It is only by the employment of a strained interpretation of these provisions that one can arrive at the conclusion that the Legislature meant something vastly different that the clear meaning of the language employed in those provisions.

For these reasons, it is therefore respectfully submitted that the aggravating circumstance defined in A.R.S. § 13-454(E)(5) does not exist in the instant case, and that the provision itself has application only to the "murder-for hire" situations and to those instances in which the murder is committed in expectation of receiving insurance or inheritance proceeds. *State v. Rust, supra.*

* * * *

SUPREME COURT OF ARIZONA
IN BANC

Nos. 4969, 4970

STATE OF ARIZONA, APPELLEE

v.

MICHAEL KENT POLAND, and
PATRICK GENE POLAND, APPELLANTS

April 13, 1982

Rehearing Denied May 25, 1982

OPINION OF THE COURT

CAMERON, Justice.

This is a consolidated appeal by defendants Michael Kent Poland and Patrick Gene Poland from jury verdicts of guilt to the crimes of first degree murder of Cecil Newkirk and Russell Dempsey, in violation of former A.R.S. §§ 13-451 and 13-452. Defendants were sentenced to death pursuant to former A.R.S. §§ 13-453(A) and 13-454(E). We have jurisdiction of this appeal pursuant to A.R.S. § 13-4031.

Because we must reverse as a result of jury misconduct, we need not consider all the questions raised by the defendants. We will, however, consider those questions which are likely to be raised again on retrial of the matter, it being kept in mind that different evidence presented at retrial might mandate different results.

Defendants raise the following issues on appeal:

1. Jurisdiction:

   (a) Did the State of Arizona lack jurisdiction and the County of Yavapai lack venue to try defendants because of failure to show that the crimes were committed in the State of Arizona and the County of Yavapai?

   (b) Did the prior federal prosecution of defendants arising out of the same facts bar the action in the state court?

2. Suppression of Evidence:

   (a) Did a tour of Michael Poland's house constitute an impermissible warrantless search?

   (b) Was the search warrant based on statements made in reckless disregard for the truth?

   (c) Was the search warrant based on tainted, post-hypnotic statements of a witness?

   (d) Was the scanner, scanner key, and taser gun receipt seized during the search outside the scope of the search warrant?

   (e) Did the trial court err in allowing the taser gun to be admitted into evidence?

   (f) Was it reversible error to admit the testimony of a witness who, prior to trial, had been hypnotized and questioned on the subject of his testimony?

3. Was the evidence sufficient to support the verdict?

4. Did the jury's knowledge of extraneous information deny the defendants a fair trial?

5. Was there sufficient evidence to find that the murders were committed in an especially heinous, cruel or depraved manner?

The facts necessary to a determination of this appeal are as follows. At approximately 8 A.M. on 24 May 1977, a Purolator van containing some $328,180 in cash left Phoenix on a routine delivery to banks in various towns in northern Arizona. When the van failed to make its deliveries, the authorities were notified. The abandoned van with some $35,150 in cash was discovered early the next day a short distance off Highway I-17.

The evidence revealed that on the morning of 24 May 1977, a number of passing motorists had noticed a Purolator van pulled over to the side of Highway I-17 by what appeared to be a police car. Some witnesses identified the two uniformed men as Michael and Patrick Poland. The evidence also showed that on 24 May 1977, Michael and Patrick Poland borrowed a pickup truck and tarpaulin from their father, George Poland. Early on 25 May 1977, Michael Poland rented a boat at the Temple Bar Marina on Lake Mead. He stated that he planned to meet his brother Patrick at Bonelli Landing, a primitive camping area on the Lake, and to do some fishing. At some point, George Poland's truck became stuck in the sand at the water's edge at Bonelli Landing with the tailgate facing the water. After their attempts to extricate it had failed, the Polands called a towing service. Stan Sekulski was the operator of the tow truck. A few days later, the Polands returned their father's truck with a new tarp, explaining the old one had been ruined when they placed it under the wheels of the truck for traction.

Three weeks later, the body of Cecil Newkirk, one of the guards on the Purolator van, surfaced on Debbie's Cove, a small inlet on the Nevada side of Lake Mead. The body was partially covered by a canvas bag. A week later, park rangers searching the area discovered the body of the other Purolator guard, Russell Dempsey, a short distance from the place Cecil Newkirk's body had been found. Autopsies revealed that the most probable cause of death was drowning, although in the case of Mr. Dempsey the pathologist was unable to rule out a heart

attack as a possible cause of death. The bodies had been in the water two weeks or longer. There was no evidence that the guards had been wounded or tied before being placed in the water. Although it was impossible to determine whether they had been drugged, there was no evidence of a struggle. Divers searching the area recovered two other canvas bags, one containing a tarp and blanket. They also brought up two revolvers, which were identified as belonging to the guards, and a license plate bearing the insignia found on Arizona Department of Public Safety automobiles. These were found near a pile of rocks which had evidently fallen out of the bag when it was recovered by a diver. The rocks were of the type found along the shore of Debbie's Cove.

Searches of the homes of Michael and Patrick Poland on 27 July 1977 revealed a number of weapons, including a taser gun, large amounts of cash, and items of police-type paraphernalia. Of particular interest were a scanner and scanner key which were capable of monitoring radio frequencies, a notebook listing local police frequencies, a receipt for a taser gun bearing the name Mark Harris, handcuff cases, and a gunbelt. Both of the rented cars of the Polands, which were light-colored Chevrolet Malibus, had siren-type burglar alarms which could be activated from inside or outside of the car. Evidence also connected the Polands to the purchase of a "light bar" or rack which could be placed on top of an automobile and would resemble a law enforcement light bar or rack. The canvas bags found in the lake were shown to have been purchased by a Mark Harris.

Although neither Michael nor Patrick Poland had regular employment, the evidence showed that they made numerous large purchases during June and July of 1977. These purchases included appliances, furniture, motorcycles, and a business. Most of the purchases were made in cash or by a cashier's check.

The Polands' defense was alibi. They both took the stand and testified that they had disguised themselves

as law enforcement officers and robbed drug dealers on three occasions in early 1977. They testified that they had also been dealing in gems for several months prior to the Purolator incident and that on 24 May 1977, had taken a load of raw turquoise to Las Vegas and returned by way of Lake Mead to do some camping.

From the jury verdicts and judgments of guilt to first degree murder of Cecil Newkirk and Russell Dempsey, sentences of death, and denial of their motion for a new trial, defendants appeal.

JURISDICTION

a. Did the murder occur outside the jurisdiction of Arizona?

The evidence supports a finding that defendants stopped the Purolator van somewhere near the Bumble Bee exit off Highway I-17 in Yavapai County, Arizona, where they captured the two guards and took the contents of the van. The following day, defendant Michael Poland rented a boat at the Temple Bar Marina, located on Lake Mead in Mohave County, Arizona. He met his brother Patrick in the boat at Bonelli Landing, also in Mohave County. The evidence would support a finding that the defendants loaded the two guards into the boat, traveled some distance, and dumped them into the water. The bodies of the two guards were found a few miles from Bonelli Landing, in Debbie's Cove, in Clark County, Nevada. The evidence does not indicate where the deaths of the two victims actually took place.

The defense argues that, because the State had been unable to prove where the guards died, the State of Arizona has no jurisdiction to try the Polands for murder. We do not agree. Even if we assume that the actual murder took place on the Nevada side of Lake Mead, there are sufficient elements of the crime which occurred in Arizona to give the Arizona court jurisdiction.

Generally, a homicide is "committed" where the fatal wound or blow is inflicted. 40 Am.Jur.2d Homicide § 198. Jurisdiction, however, is not limited to those crimes committed totally or exclusively within the state. Jurisdiction of the Arizona courts in criminal cases extends to crimes when any element has been committed in the State of Arizona.

> "A. This state has jurisdiction over an offense that a person commits by his own conduct or the conduct of another for which such person is legally accountable if:
>
> 1. Conduct constituting any element of the offense or a result of such conduct occurs within this state; * * *" A.R.S. § 13-108(A)(1).

When the elements of a crime are committed in different jurisdictions, any state in which an essential part of the crime is committed may take jurisdiction. *State v. Scofield*, 7 Ariz.App. 307, 438 P.2d 776 (1968). "Any element," then, can confer jurisdiction. *State v. Bussdieker*, 127 Ariz. 339, 621 P.2d 26 (1980).

The elements of first degree murder are: (1) the unlawful killing (2) of a human being (3) with malice aforethought. Former A.R.S. § 13-451(A). There was evidence of the defendants' activities in planning the crime, for example, the purchase of the canvas bags used to hold the bodies of the victims and the boat rental. These acts constituted evidence of premeditation from which the element of malice aforethought could be infered. *State v. Tostado*, 111 Ariz. 98, 523 P.2d 795 (1974); *State v. Bustamante*, 103 Ariz. 551, 447 P.2d 243 (1968). These acts of premeditation occurred in Arizona. We hold that Arizona had jurisdiction to try the defendants.

But defendants also urge that they should not have been tried in Yavapai County because of improper venue. Defendants contend that they have a state constitutional

right to be tried in the county where the deaths occurred. The Arizona Constitution states:

> "Section 24. In criminal prosecutions, the accused shall have the right * * * to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, * * *." Arizona Constitution, Art. 2, § 24.

And our statute at the time of the offenses read:

> "Where several acts are requisite to the commission of an offense, the trial may be in any county in which any of such acts occurs." Former A.R.S. § 13-1504(B). See present A.R.S. § 13-109(A).

In dismissing a Pima County indictment for attempted murder for hire, where the payment for the murder was made in Pinal County, our Court of Appeals stated:

> "We therefore hold that under A.R.S. Sec. 13-1504 (B) the act must be one essential to the commission of the crime charged as such crime is defined by statute. In other words, the act must be part of the corpus delicti of the crime if it is to have any jurisdictional significance. (citations omitted)" *State v. Cox*, 25 Ariz.App. 328, 331, 543 P.2d 449, 452 (1975).

We believe the instant case and *State v. Cox*, supra, can be distinguished. In *Cox*, all the acts constituting the crime of attempted murder for hire occurred in Pinal County and Pima County was not the correct venue. In the instant case, the crime is premeditated murder. Premeditation is part of the corpus delicti of the crime of first degree murder and the evidence indicates that, in addition to an intent, there were numerous acts of premeditation which occurred in Yavapai County, including particularly the kidnapping of the victims. There were, then, sufficient essential acts requisite to the commission of the crime which occurred in Yavapai

County. Venue for the trial was properly in Yavapai County.

b. Does the principle of double jeopardy bar prosecution by the State of Arizona?

Prior to the trial in the instant case, the defendants were convicted in federal court of armed robbery and kidnapping of the two guards. The trial in Arizona was for the murder of the same two guards. Defendants urge that prosecution by the State of Arizona was barred by their conviction in federal court for acts arising out of the same transaction. We do not agree.

In *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959), the Supreme Court of the United States held that state prosecutions of defendants who had already been prosecuted in federal court for the same acts did not violate due process. The court in *Bartkus* reasoned that an individual is a citizen of both the United States and a state or territory and is subject to the laws of both. Because a single act could violate both federal and state law, prosecutions by the state and the federal government may be based on a single act and be proven by the same facts without violating due process. The court in *Bartkus* said:

> "With this body of precedent as irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense, it would be [in] disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar. * * *" *Bartkus v. Illinois*, supra, 359 U.S. at 136, 79 S.Ct. at 685, 3 L.Ed.2d at 694.

Bartkus stands for the rule that, as far as the United States Constitution reaches, a defendant may, based upon the same facts, be guilty of crimes against two sovereigns

at the same time and be punished for each crime separately and without regard to the other.

Although some state courts have suggested limits to *Bartkus*, *Commonwealth v. Mills*, 447 Pa. 163, 286 A.2d 638 (1971); *State v. Fletcher*, 26 Ohio St.2d 221, 271 N.E.2d 567 (1971); *People v. Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976), we find no reason to change this long standing rule. We hold that, even if the defendants were charged and convicted upon the same set of facts that supported the federal convictions, the United States Constitution and *Bartkus* would allow the state convictions to stand.

Defendants contend, however, that the Arizona prosecution is barred by former A.R.S. § 13-146 (now A.R.S. § 13-112), which stated:

> "When on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United States, or of another state or country, founded upon the act or omission in respect to which he is on trial he has been acquitted or convicted, it is a sufficient defense." A.R.S. § 13-146 (now A.R.S. § 13-112).

We disagree. This is not a situation of parallel prosecutions. The prosecutions were for distinct and separate crimes occurring at different times. The federal prosecutions were for kidnapping and armed robbery, while the state prosecution was for murder. A.R.S. § 13-146 does not prevent Arizona from prosecuting the Polands for murder. See *Henderson v. State*, 30 Ariz. 113, 244 P. 1020 (1926); *State v. Wortham*, 63 Ariz. 148, 160 P.2d 352 (1945).

Defendants also urge that the State prosecution constitutes double punishment contrary to A.R.S. § 13-116. They urge that the same evidence used by the federal prosecution was "reused" to convict them of separate crimes in the state court. Under the identical elements test, evidence supporting one charge is eliminated to de-

termine whether the remaining evidence supports the elements of the additional charge. *State v. Tinghitella*, 108 Ariz. 1, 491 P.2d 834 (1971). In the instant case, as we have noted above, all three crimes have sufficient separate factual bases to stand alone. Further, the identical elements test applies only when the State seeks convictions for more than one crime arising out of the same criminal transaction. Here the State only charged the defendants with murder, and the double punishment section does not apply. We find no error.

SUPPRESSION OF PHYSICAL EVIDENCE

a. Tour of Michael Poland's house.

During the investigation of the crimes, the F.B.I. learned that the home Michael Poland was renting was for sale. Agent Gotliebson, who had been conducting a surveillance on Michael Poland's residence, contacted the realtor and, posing as a prospective home buyer, arranged to view the premises. During the tour on 24 June 1977, which included the house, garage, barn, and various shelves and closets in the house, Agent Gotliebson noted a number of firearms and two motorcycles. A search of Michael Poland's house pursuant to a warrant was executed on 27 July 1977.

Because Gotliebson gained entry by misrepresenting his identity and purpose, the defendants urge that the entry was an illegal search in violation of the Fourth and Fourteenth Amendments, and all evidence seized pursuant to the subsequent search warrant must be suppressed as fruit of the poisonous tree under *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

We do not agree. The government is entitled to use decoys and to conceal the identity of its agents, *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.E.2d 312 (1966), and law enforcement officers may pose as potential buyers to investigate illegal firearms, *United*

States v. Ressler, 536 F.2d 208 (7th Cir. 1976); or narcotics, *United States v. Glassel*, 488 F.2d 143 (9th Cir. 1973). They may also state that they are on some other business to gain access to property or induce the suspect to open the door. For example, law enforcement officials posed as a hotel manager in *State v. Sardo*, 112 Ariz. 509, 543 P.2d 1138 (1975); a friend in *United States v. Raines*, 536 F.2d 796 (8th Cir. 1976); a motorist with car trouble in *United States v. Wright*, 641 F.2d 602 (8th Cir. 1981); and a potential Ku Klux Klan member in *United States v. Bullock*, 590 F.2d 117 (5th Cir. 1979).

The only limitation appears to be that the agent is limited to conduct which would be normal for one adopting the disguise used in seeking entry:

> "When an agent assumes a particular pose in order to gain entry into certain premises and then obtains information by engaging in *activity not generally expected of one assuming that pose*, that information is illegally obtained * * *." *United States v. Ressler*, supra, at 211. (emphasis added)

In the instant case, the agent saw what would normally be seen by any prospective buyer inspecting the house. The defendant, however, urges that the reasonableness of the search accomplished through deception depends upon whether the agents were present for purposes contemplated by the occupant. We do not agree. The Court in *Lewis*, supra, did consider it relevant that the official was on the premises "for the very purposes contemplated by the occupant." However, defendant's reliance on the *purpose* as the distinguishing factor between permissible and impermissible searches is, we believe, misplaced. In the case of a deceitful entry, the law enforcement agent's purpose will, by definition, be different than that contemplated by the suspect. In the instant case, the agent may see only what any prospec-

tive buyer would expect to see. To hold that the validity of the search in the case of deceitful entry depends upon whether the purpose of the agent in entering the premises was the same as the reason the suspect allowed him to enter, would make all deceitful entry searches unconstitutional. The distinction, then, between permissible and impermissible intrusions turns on what the suspect, as a result of the agent's deceit, has chosen to show to the one entering the premises. The United States Supreme Court has stated:

> "* * * the Fourth Amendment protects people not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576, 582 (1967).

We hold that the entry did not constitute an unreasonable search.

b. Sufficiency of the search warrant affidavit

During the preliminary investigation of the crimes, the Poland brothers emerged as suspects. The F.B.I. formulated the theory that the Polands, disguised as law enforcement officials and driving what appeared to be a police vehicle, had pulled over the Purolator van on Highway I-17 and stolen the cash it was carrying. The F.B.I. suspected that the Polands overpowered the guards and took them to Lake Mead, where they dumped them into the water. To substantiate this theory, the F.B.I. sought search warrants for the homes, cars, rented storage lockers, and persons of Michael and Patrick Poland, and the home and truck of their father, George Poland. The affidavit for a search warrant requested authorization to seize, among other things, currency, money bags, police-type wearing apparel and paraphernalia, weapons, cloth bags large enough to place over an individual, and

receipts of expenditures. The affidavit executed by F.B.I. Special Agent John Oitzinger runs more than four typed pages, detailing the facts of the crimes and findings of the investigation. The affidavit included the report of a tracker regarding wheel tracks on the shoulder of I-17 where the F.B.I. believed the van was stopped and statements of witnesses who saw a "police car" and the van pulled off the road. It also included statements of the individual who rented a boat to Michael Poland. The affidavit noted that collect calls were made from the Bumble Bee area to Patrick Poland's home on two occasions prior to the crimes. It alleged that neither Michael nor Patrick Poland had worked at regular employment recently, but that both had made substantial purchases in the two months following the crimes. We believe that the recital of facts in the affidavit was sufficient to support the issuance of the warrant.

Defendants contend, however, that some of the statements in the affidavit were made in reckless disregard of the truth. Two weeks after the crime, the boat that was rented by Michael Poland on 25 May 1977 was identified and impounded by the F.B.I. A routine report was prepared by Special Agent Oldham, in which he stated that there was a "small red stain" on the bottom of the scoop which had been found in the boat. In preparing his affidavit for the search warrant, Agent Oitzinger reviewed the reports, examined the scoop, and wrote the following description:

> "Some hairs and fibers and blood found on a plastic half gallon container with the bottom cut off (probably used for the purpose of bailing water) and an empty Coors beer can were retained as evidence."

Several days after the affidavit was signed, Agent Oitzinger received the results of the tests conducted by the F.B.I. Laboratory in Washington, D.C., which indicated that the scoop contained no hair, fibers, or blood.

Defendants, citing *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), urge that the statement that the scoop contained blood was a knowing or intentional falsehood, or, alternatively, that it was made with a reckless disregard for its truth or falsity. They contend that evidence of blood is so prejudicial in a murder investigation that it contributed substantially to a finding of probable cause. They conclude that the search warrant based on false information was invalid and that all evidence seized pursuant to it must be suppressed.

In *Franks v. Delaware*, supra, the United States Supreme Court held that a defendant may attack a search warrant affidavit when probable cause was based on intentional or reckless falsehood. If the defendant is able to make a substantial preliminary showing that the false statement was made knowingly and intentionally, or with reckless disregard for the truth and that the false statement is necessary to a finding of probable cause, the defendant is entitled to a hearing. If at the hearing defendant proves perjury or reckless disregard by a preponderance of the evidence, the false statement is excised from the affidavit. The affidavit's remaining content must be sufficient to establish probable cause, or the search warrant is voided and evidence seized pursuant to it excluded. *United States v. Young Buffalo*, 591 F.2d 506 (9th Cir. 1979).

In the instant case, Oitzinger admitted that the portion of the affidavit alleging that there was blood on the scoop was false but not intentionally or recklessly false. He testified concerning the preparation of the affidavit:

> "Q And that was not true with respect to the blood sample that was included in the affidavit, the reference to the blood sample, was it?
>
> "A At the time I reported that I wasn't sure. I thought it was blood.
>
> * * * *

"BY MR. EATON: It wasn't the truth, was it?

"A At the time I thought it was.

"Q It was not the truth, was it? Answer the question yes or no.

"A At the time I thought it was the truth.

"Q All right. You had no expert information which you bothered to consult which would have told you whether or not that statement that you were making in the affidavit was the truth, isn't that correct?

"A It turns out it was not the truth.

"Q And you didn't think that was reckless conduct on your part?

"A No, I do not.

We do not believe that Agent Oitzinger's failure to obtain the test results before signing the affidavit constituted reckless disregard for the truth. In *United States v. Davis*, 617 F.2d 677 (D.C.Cir.1979), the court defined reckless disregard for the truth by analogy to the law of defamation. Citing *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) and *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed. 2d 115 (1979), the *Davis* court found that the affiant acted with reckless disregard if he "in fact entertained serious doubts as to the truth of his publication." This could be shown by actual deliberation or by "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Davis*, supra at 694. Agent Oitzinger's testimony indicates that he did not entertain serious doubts as to the truth of his affidavits and we agree. However, even if we believe that the actions of the agent constituted a reckless disregard for the truth, the affidavit's remaining contents are sufficient to establish probable cause. *United States v. Young Buffalo*, supra. We find no error.

c. Was the search warrant based on improper post-hypnotic statements?

Defendants next challenge the use of post-hypnotic statements made by Stan Sekulski, a witness for the prosecution, who towed George Poland's truck out of the sand at Bonelli Landing on 25 May 1977. Defendants cite *State v. La Mountain*, 125 Ariz. 547, 611 P.2d 551 (1980) and *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981) for the proposition that statements by a witness who has been hypnotized are unreliable and inadmissible in criminal cases. We have not precluded, however, the use of hypnosis for the purpose of finding probable cause for the issuance of a search warrant. As we noted:

> "* * * Although we perceive that hypnosis is a useful tool in the investigative stage, we do not feel the state of the science (or art) has been shown to be such as to admit testimony which may have been developed as a result of hypnosis. * * *" *State v. La Mountain*, supra, 125 Ariz. at 551, 611 P.2d at 555.

And again:

> "In conclusion, the use of hypnosis during the investigative stage is permissible if used with great reserve by trained personnel with reasonable safeguards." *State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 187, 644 P.2d 1266, 1273 (filed 7 January 1982). On 2 March 1982, the Motion for Rehearing was granted in *State ex rel Collins v. Superior Court* to reconsider the hypnotism issue.

Whatever the rule may be regarding hypnotically induced testimony at trial, we have not excluded hypnotically produced statements to determine probable cause for a search warrant. Such statements, like hearsay, if properly corroborated, are not unreliable and may be used to find probable cause for the issuance of a search warrant. We find no error.

d. Seizure of the taser gun, scanner, and scanner key.

During the search of Mike Poland's home, on 26 July 1977, F.B.I. agents found a receipt from a gunshop for a taser gun, a weapon which temporarily paralyzes the victim with an electrical charge. The name on the receipt was Mark Harris. They also discovered a scanner, which is an instrument used to monitor radio frequencies. At Patrick Poland's house, they found a scanner key. These items were retained as evidence and later introduced at trial. Defendants contend that these items were neither contraband nor listed in the search warrant and therefore were illegally seized. Because the link of the items to the crime was speculative, defendants argue that the items were unduly prejudicial and should have been suppressed at trial.

Arizona law provided that evidence may be seized even though it is not listed in the search warrant. Former A.R.S. § 13-1446(C) stated:

> "A peace officer executing a search warrant may seize any property discovered in the course of the execution of such warrant if he has reasonable cause to believe that such item is subject to seizure under § 13-1442, even if such property is not enumerated in the warrant."

The F.B.I. investigation had revealed that the robbery of the Purolator van had been committed by people posing as law enforcement officials. Evidence of the defendants' capability to monitor police radio frequencies was therefore relevant. The taser gun receipt also indicated that it had been purchased by an alias or accomplice, suggesting that it may have been purchased in contemplation of the crime or by another involved in the crime. We hold that the receipt for the taser gun, scanner, and scanner key were seizable under former A.R.S. § 13-1446(C).

Defendants, however, challenge the seizure on United States constitutional grounds, urging that seizure of items

unnamed in the warrant constituted a general search which is proscribed by the Fourth and Fourteenth Amendments. We do not agree. Evidence may be seized if it is reasonably related to the crime, even if not listed in the search warrant. See *Coolidge v New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). We have stated:

> "The record clearly supports the conclusion that the officers were on Scigliano's premises pursuant to execution of a valid search warrant and that the challenged items * * * were found during a limited search which was reasonably calculated to locate items actually named in the warrant, as opposed to a general exploratory search of the premises. We also believe that the facts surrounding the search * * * provided a sufficient nexus between the disputed items and the crime for which the warrant was issued, so that the officers had probable cause to believe that those items were 'reasonably related' to the crime." *State v. Scigliano*, 120 Ariz. 6, 9, 583 P.2d 893, 896 (1978). See also *State v. Smith*, 122 Ariz. 58, 593 P.2d 281 (1979); *State v. Shinault*, 120 Ariz. 213, 584 P.2d 1204 (App.1978).

We hold that the receipt for the taser gun, the scanner, and the scanner key were properly seized and admitted at trial.

e. Admissibility of the taser gun.

Defendants challenge the admissibility of the taser gun, arguing that its connection to the crimes was never proven and therefore that its probative value was greatly outweighed by its prejudicial effect.

The initial question is whether the gun was relevant to issues in the case. Rule 401, Arizona Rules of Evidence, 17A A.R.S. states:

> " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is

> of consequence to the determination of the action more probable or less probable that it would be without the evidence."

We do not believe that the taser gun was relevant to a determination of the facts in this case. Admission into evidence of weapons which are not connected with the crime can be prejudicial to the defendant and has been held to be reversible error. *United States v. Green*, 648 F.2d 587 (9th Cir. 1981); *United States v. Warledo*, 557 F.2d 721 (10th Cir. 1977). In the instant case, the State did not connect the weapon to the crime, and it was an abuse of discretion to admit the taser gun into evidence.

f. Admissibility of post-hypnotic statements at trial.

Defendants also argue that Mr. Sekulski's post-hypnotic testimony should have been excluded at trial, citing *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981) and *State v. La Mountain*, 125 Ariz. 547, 611 P.2d 551 (1980). *Mena* and *La Mountain* were both decided by this court after the trial in the instant case. Upon retrial, we assume that the trial court will comply with the decisions of this court concerning the admissibility of hypnotically induced testimony. See *State ex rel. Collins v. Superior Court*, supra.

SUFFICIENCY OF THE EVIDENCE

Pointing to a number of gaps in the State's case, the defendants argue that there was insufficient evidence to support the verdict. If there was insufficient evidence to support a conviction, it would not be proper to remand for a new trial as the double jeopardy clause of the Fifth Amendment precludes a second trial after appeal where there was insufficient evidence to sustain the verdict. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

We find that there was substantial evidence to support the jury's verdict. Defendants were linked to purchases of weapons, canvas bags, and police-type paraphernalia. Their own testimony placed them on the highway on the day of the robbery and at Lake Mead renting a boat on the following day. Though unemployed, both began paying off bills and making large cash purchases shortly after the robbery. Where there exists "substantial evidence from the entire record from which a rational trier of fact could have found guilt beyond a reasonable doubt," we will uphold the verdict. *State v. Schad*, 129 Ariz. 557, 572, 633 P.2d 366, 381 (1981). The jury chose to believe the evidence offered by the State, and to disbelieve the alibis of the defendants. This was their prerogative. *State v. Pieck*, 111 Ariz. 318, 529 P.2d 217 (1974). There was sufficient evidence upon which the trier of fact could find the defendants guilty. The defendants may be retried. *Burks*, supra. We find no error.

JURY MISCONDUCT

Rule 24.1(c), Arizona Rules of Criminal Procedure, 17 A.R.S., provides, in part, that the court may grant a new trial when:

> "(3) A juror or jurors have been guilty of misconduct by:
>
> (i) Receiving evidence not properly admitted during the trial;
>
> * * * *
>
> (iii) Perjuring himself or willfully failing to respond fully to a direct question posed during the voir dire examination;"

And subsection (d) provides:

> "d. Admissibility of Juror Evidence to Impeach the Verdict

> "Whenever the validity of a verdict is challenged under Rule 24.1(c)(3), the court may receive the testimony or affidavit of any witness, including members of the jury, which relates to the conduct of a juror, official of the court, or third person. No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict." Rule 24.1(c & d), Arizona Rules of Criminal Procedure, 17 A.R.S.

Inquiry into jury misconduct was limited at common law by the rule that a juror who has agreed to the verdict in open court may not later impeach his own verdict. *State v. Cookus*, 115 Ariz. 99, 563 P.2d 898 (1977). The policy was to protect the process of frank and conscientious jury deliberations and the finality of jury verdicts. See Carlson and Sumberg, Attacking Jury Verdicts: Paradigms for Rule Revision, 1977 Ariz. State L.J. 247. However, when jury misconduct results in prejudicial influences on the jury, the defendant might be deprived of procedural safeguards afforded by a trial, the right to counsel, to confront witnesses against him, and to choose not to take the stand on his own behalf. *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.Ed. 2d 420 (1966); *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); *State v. Skinner*, 108 Ariz. 553, 503 P.2d 381 (1972). Therefore, our rules now provide that juror testimony is admissible to impeach a verdict, but only for the types of jury misconduct enumerated in Rule 24.1(c)(3), Arizona Rules of Criminal Procedure, 17 A.R.S., and in the manner provided by subsection (d), supra. See Comment to Rule 24.1; *State v. Rose*, 121 Ariz. 131, 589 P.2d 5 (1978). See also American Bar Association Standards Relating to Trial by Jury, § 5.7 (Approved Draft, 1968); *State v. Landrum*, 25 Ariz.App. 446, 544 P.2d 270 (1975). In the instant case, affidavits and testimony by the jurors were admissible to show specific instances of jury misconduct.

a. Considering evidence not admitted at the trial.

Prior to trial and again before deliberations, the jury had been admonished and instructed "you must determine the facts only from the evidence produced in court." During deliberations, one juror looked up Harris names in the Phoenix telephone directory. Juror Phyllis Clemmer testified:

> "Q Mrs. Clemmer, tell us if you will in your own words as best you can about the phone book matter relating to, number one, the name Mark Harris, and, number two, Phoenix Tent and Awning?
>
> "A Gail Peoples said during the deliberations, well, I wonder how many Mark Harrises there are in Phoenix, and I said, well, I have a Phoenix phone book at home, I will look it up for you. So I looked it up that night and in the morning I said that there are four Mark Harrises listed in the Phoenix phone book. This was a 1979 phone book. And Gail was so speculative about whether or not the bags had been made at Phoenix Tent and Awning, and I said, well, I lived there for an awful lot of years and I don't know of another tent and awning manufacturer in Phoenix, so they must have been made there.
>
> So while I was looking in the phone book I looked under tent and awning and found several retail places—several places that rented tarps and canvas products, but only one manufacturer which was a fact that I was already sure of in my mind; that is all I did.
>
> "Q And did you relate something back to the jury at all one way or the other about the Phoenix Tent and Awning?
>
> "A Just that was the only manufacturer listed."

Mark Harris was the name found on the taser gun and canvas bag receipts. Phoenix Tent and Awning, the business which allegedly made the canvas bags found with

the victims, was the only manufacturer of canvas bags in the Phoenix area. She reported her findings to the jury. Defendants contend that this evidence was not properly before the jury, was prejudicial, and mandated a new trial under Rule 24.1(c)(3)(i), Arizona Rules of Criminal Procedure, 17 A.R.S.

The information found in the Phoenix telephone book by Juror Clemmer clearly qualifies as evidence not properly admitted during the trial. Rule 24.1(c)(3)(i), Arizona Rules of Criminal Procedure, 17 A.R.S. Our Court of Appeals has stated:

> "The jury may consider only matter that has been received in evidence and any breach of this principle should not be condoned if there is the slightest possibility that harm could have resulted." *State v. Turrentine*, 122 Ariz. 39, 41, 592 P.2d 1305, 1307 (App. 1979).

The question is whether the fact that this evidence was before the jury requires reversal. Not all extraneous information is so prejudicial as to require reversal. The standard enunciated by the Ninth Circuit is that the defendant is entitled to a new trial if it cannot be concluded beyond a resonable doubt that the extrinsic evidence did not contribute to the verdict. *United States v. Vasquez*, 597 F.2d 192 (9th Cir. 1979); *Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980) cert. denied 450 U.S. 1035, 101 S.Ct. 1749, 68 L.Ed.2d 231 (1981). We adopt the reasonable possibility standard applied by the Ninth Circuit as an appropriate balancing test and in harmony with the standards applied in other circuits. See, e.g., *Bulger v. McClay*, 575 F.2d 407 (2nd Cir. 1978), cert. denied sub. nom. *Ward v. Bulger*, 439 U.S. 915, 99 S.Ct. 290, 58 L.Ed.2d 263, "Significant possibility of prejudice"; *Virgin Islands v. Gereau*, 523 F.2d 140 (3rd Cir. 1975), cert. denied 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed. 2d 323 (1976), "prima facie incompatible with the Sixth Amendment"; *United States v. Marx*, 485 F.2d 1179

(10th Cir. 1973), cert. denied 416 U.S. 986, 94 S.Ct. 2391, 40 L.Ed.2d 764 (1974), "slightest possibility that harm could have resulted"; *United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972) and *Osborne v. United States*, 351 F.2d 111 (8th Cir. 1965), "might have operated to the substantial injury of the defendant"; *Farese v. United States*, 428 F.2d 178 (5th Cir. 1970), "reasonable possibility that information affected the verdict."

The finding of four Mark Harrises in the Phoenix telephone book does not appear to have had any prejudical impact on the minds of the jurors, and we can conclude beyond a reasonable doubt that information concerning Phoenix Tent and Awning did not contribute to the verdict. *Vasquez*, supra.

A more serious matter, however, concerns evidence of defendant's prior convictions. Prior to trial, the trial court ruled to exclude, as prejudicial, evidence of defendants' prior federal convictions. The defendants' federal convictions for robbery and kidnapping were based upon evidence leading up to the state prosecution for murder. Evidence of the prior convictions did not come in at trial, although there were references by both parties to prior proceedings related to the case. Nevertheless, evidence developed at the hearing on the motion for new trial indicated that some of the jurors found out that the defendants had been convicted in the prior proceedings and were currently serving sentences. Several jurors were called regarding this information. Juror Gail Lynn Peoples testified:

> "Q You have provided an Affidavit to the Court detailing occurrences which you observed during the jury deliberations in that particular matter?
>
> "A Yes, sir.
>
> "Q Mrs. Peoples, without indicating in detail what you have already supplemented to the Court or submitted to the Court, during the course of the deliberations, were statements made concerning the

prior convictions of Michael Poland and Patrick Poland?

"A Yes, they were.

"Q Do you recall when those statements were made?

"A They were made—I do recall specifically that they were made on the first day of deliberation, which was Friday, I believe, and I am not sure about Saturday, but I know for sure on Friday.

"Q Drawing your attention to that Friday, which was the day after Thanksgiving, could you describe for the Court the context in which these discussions concerning or the mention of the prior conviction came up?

"A Okay, at that point the vote was ten to two—

* * * *

"Q Describe for the Court the context in which the mention of the prior conviction first came up on Friday?

"A Exactly what was said, is that what you mean?

"Q Yes.

"A I am not sure who initiated the statement. I know that Mrs. Clemmer did say that it isn't as if they were going to go free, because they have already been sentenced to a hundred years.

"Q Did she say anything further along that line?

"A No, that is all I recall.

"Q Did this discussion occur early in the day or late in the day?

"A Late.

* * * *

"Q When did the mention of the prior conviction come up again?

"A Okay. I don't remember exactly who said it or what exactly was said, but there were comments made about it. One of the jurors said if they were

found guilty before, then the other jury must have had more evidence than we have.

"Q Do you recall on what day this discussion occurred?

"A I believe it was on Saturday."

And Orval Anderson testified:

"Q Mr. Anderson, during the course of the deliberations, did the subject of the prior conviction of the Poland brothers come up?

"A Yes, at one time it did.

* * * *

"THE COURT: Did you say that you did not recall who made the statement—do you have any recollection at all who may have made it?

"THE WITNESS: You mean the statement about the prior?

"THE COURT: Yes.

"THE WITNESS: No, Your Honor, I can't remember who said—the only reason I can remember it, they were trying to get me to change my decision and it had nothing to do with my decision, but I can't remember.

"THE COURT: Now, were you one of the jurors, Mr. Anderson, who in the selection process testified that you had some recollection of a prior proceeding?

"THE WITNESS: No."

Two other jurors, Green and Markides, testified that the defendants' prior convictions were discussed.

On the contrary, Juror Phyllis Clemmer testified:

"Q And were you present during the two days of deliberation, ma'am?

"A Yes.

"Q Were you present for the entire deliberative process?

"A Yes, I was.

"Q When you went into that jury room, did you know that there had been in fact another trial and that the defendants had in fact been convicted?

"A No, I did not.

"Q At any time during the two days, ma'am, at which you were in the jury room, did you ever overhear anyone else say that these defendants had been convicted in another trial?

"A No, I did not.

"Q And specifically, Mrs. Clemmer, did you ever say, to yourself, Phyllis Clemmer ever say that they weren't going free because they had already served a hundred years in federal court?

"A No, I did not say that because I didn't know it."

Jurors Tackitt, Cutbirth, Herman, Wright, Robertson, and Lorencen also testified that the matter had never come up during juror deliberations. There were, then, 4 jurors who testified that mention of the defendants' prior convictions had been discussed during juror deliberations and 7 testified that no mention was made of the prior convictions. Defendants urge that the presence of this inadmissible evidence during deliberations requires a new trial and we agree.

Since the federal convictions were based on the same series of acts as were at issue in the state prosecution, evidence of the prior convictions is inherently prejudicial. Testimony of several of the jurors indicates that the information was mentioned in the jury room. The knowledge that another jury considered the same evidence against defendants and found them guilty was bound to have influence on the jury. We cannot conclude beyond a reasonable doubt that this evidence did not contribute to the verdict. *Vasquez*, supra. The matter will have to be reversed and remanded for a new trial.

AGGRAVATING CIRCUMSTANCES

In sentencing defendants, the trial judge found the following aggravating circumstances to exist:

> "13-454(E)(6). The defendant committed the offense in an especially heinous, cruel, or depraved manner."

Finding no mitigating circumstances sufficiently substantial to call for leniency, the trial court imposed the death penalty pursuant to A.R.S. § 13-454(D).

In interpreting the aggravating circumstances that the offense was committed in an especially heinous, cruel, or depraved manner, we have stated:

> "* * * the cruelty referred to in the statute involved the pain and the mental and physical distress visited upon the victims. Heinous and depraved as used in the same statute meant the mental state and attitude of the prepetrator as reflected in his words and actions." *State v. Clark*, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980), cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612.

We do not believe that the evidence so far produced in this case shows that the murders were cruel. We have interpreted "cruel" as "disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic." *State v. Lujan*, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979), quoting Webster's Third New International Dictionary. There was no evidence of suffering by the guards. The autopsy revealed no evidence that they had been bound or injured prior to being placed in the water, and there was no sign of a struggle. Cruelty has not been shown beyond a reasonable doubt. *State v. Lujan*, supra; *State v. Ortiz*, Ariz., 639 P.2d 1020 (1981); *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980); *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978).

Neither does the evidence support a finding that the murders were heinous or depraved. These terms were defined in *State v. Lujan*, supra:

> "heinous: hatefully or shockingly evil: grossly bad
>
> * * * *
>
> "depraved: marked by debasement, corruption, perversion or deterioration." 124 Ariz. at 372, 604 P.2d at 636.

The issue focuses on the state of mind of the killer. *State v. Lujan*, supra. The difficulty in making this determination in the case at bar is that there is very little evidence in the record of the exact circumstances of the guards' deaths. Although defendants' state of mind may be inferred from their behavior at or near the time of the offense, *State v. Lujan*, supra, we know nothing of the circumstances under which the guards were held hostage.

The State must prove the existence of aggravating circumstances beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, cert. denied 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). We do not believe it has been shown beyond a reasonable doubt that the murders were committed in an "especially heinous, cruel or depraved manner."

We do note, however, that the trial court mistook the law when it did not find that the defendants "committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-454(E)(5). In so holding the trial judge stated:

> "5. The court finds the aggravating circumstances in § 13-454E(5) is not present. This presumes the legislative intent was to cover a contract killing. If this presumption is inaccurate, the evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00.
>
> "This, then, would be an aggravating circumstance."

It was not until after the trial in this case that we held, in *State v. Clark*, supra, that A.R.S. § 13-454(E)(5) was not limited to "murder for hire" situations, but may be found where any expectation of financial gain was a cause of the murder. Upon retrial, if the defendants are again convicted of first degree murder, the court may find the existence of this aggravating circumstance.

Reversed and remanded for new trial pursuant to this opinion.

HOLOHAN, C. J., GORDON, V. C. J., and HAYS and FELDMAN, JJ., concur.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

No. 8850

STATE OF ARIZONA, PLAINTIFF

—vs—

MICHAEL KENT POLAND and
PATRICK GENE POLAND, DEFENDANTS

NOTICE OF INTENT TO SEEK THE DEATH SENTENCE AND SENTENCING MEMORANDUM

Comes now the State of Arizona, by and through its attorney undersigned, and hereby notifies the defendants that it intends to seek the sentence of death for the charge of murder, first degree. The reasons are set out in the attached memorandum.

Respectfully submitted this 7 day of December, 1982.

CHARLES R. HASTINGS
Yavapai County Attorney

/s/ A. Melvin McDonald
A. MELVIN MCDONALD
Special Yavapai Deputy
County Attorney

/s/ W. Ronald Jennings
W. RONALD JENNINGS
Special Yavapai Deputy
County Attorney

/s/ Steven J. Twist
STEVEN J. TWIST
Special Yavapai Deputy
County Attorney

MEMORANDUM

Ariz.Rev.Stat.Ann. § 13-454(D) provides that the trial court shall impose the sentence of death if it finds the existence of one or more aggravating circumstances set out in § 13-454(E) and, after considering anything the defendant offers in mitigation, it finds no mitigation sufficiently substantial to call for leniency.

A. *Prior Conviction of Patrick Poland*

The aggravating circumstance set out in Ariz.Rev.Stat. Ann. § 13-453(E)(2) provides:

> 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

Defendant PATRICK POLAND was convicted of Bank Robbery and Use of a Dangerous Weapon in Bank Robbery in violation of Title 18, United States Code, Sections 2113(a) and 2113(d) in United States District Court on October 5, 1981. He was sentenced by Judge Hardy to fifteen years imprisonment. The indictment alleged that PATRICK POLAND

> . . . willfully and unlawfully, by force, violence and intimidation, did take from the person and presence of Alison Elizabeth Waite and Patricia Griffin, approximately One Thousand Three Hundred Seventy Four Dollars ($1,374.00) in money belonging to and in the care, custody, control, management and possession of the Greater Arizona Savings and Loan Association, 2335 E. Camelback Road, Phoenix, Arizona, the deposits of which were insured by the Federal Savings and Loan Insurance Corporation. PATRICK GENE POLAND, in committing this offense, did assault Alison Elizabeth Waite and Patricia Griffin, and put their lives in jeopardy by means and use of a dangerous weapon, that is, a handgun.

The crime of use of a dangerous weapon in Bank Robbery clearly involves the "use or threat of violence against another person" as required Ariz.Rev.Stat.Ann. § 13-453(E)(2). Moreover, the facts alleged in the indictment against PATRICK POLAND which were provided by the Government at trial specifically indicate the threat or use of violence during the crime. Accordingly, PATRICK POLAND's prior conviction is an aggravating circumstance which must be taken into account in deciding whether to impose the death penalty against PATRICK POLAND. See *State v. Tison*, 129 Ariz. 526, 544, 633 P.2d 335, 353 (1981); *State v. Jordan*, 126 Ariz. 283, 287, 614 P.2d 825, 829 (1980); *State v. Steelman*, 126 Ariz. 19, 24, 612 P.2d 475, 489 (1980); *State v. Evans*, 120 Ariz. 158, 162, 584 P.2d 1149, 1153 (1978).

B. *Murder for Pecuniary Gain*

Ariz.Rev.Stat.Ann. § 13-453(E)(5) provides for the following aggravating circumstances:

> 5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

In *State v. Clark*, 126 Ariz. 428, 616 P.2d 888, cert. denied 101 S.Ct. 796 (1980), the Arizona Supreme Court clearly stated that this section making pecuniary value an aggravating factor was not limited to a hired gun situation but extended to a case in which the defendant killed the victims and then stole their credit cards, money, diamond rings and automobile.

It is submitted that MICHAEL and PATRICK POLAND are both subject to this aggravation factor, in the instant case. The conduct by defendants was even more egregious than that in *Clark*. MICHAEL and PATRICK POLAND meticulously planned and carried out the robbery of the Purolator Van, which netted the POLANDS a sum in excess of $250,000. The evidence

showed that the POLANDS surveilled the route the Purolator Van took as it made its regular run to Northern Arizona. They purchase specially made bags—six feet long and three feet in circumference—before the robbery of the van. It is surely more than mere coincidence that both guards were under 6 feet tall—a circumstance the POLANDS could observe during their meticulous surveillance of the van. Those bags were used to drown the two Purolator Guards—a clear indication that the POLANDS not only planned the robbery, but carefully planned the murder of the two guards as well. Thus, the murder of Russell Dempsey and Cecil Newkirk was not merely incidental to the robbery of the purolator van, but was an integral part of the POLAND's plan to steal the money. Surely, this is precisely the sort of circumstance that the pecuniary gain aggravating factor is intended to encompass. Thus, murder for pecuniary gain is an aggravating factor in both MICHAEL POLAND's and PATRICK POLAND's case. *State v. Clark*, supra, *State v. Poland*, —— Ariz. —— —— ——, 645 P.2d 784, 800 (1982).

C. *The Heinous and Depraved manner in which the Guards were murdered.*

Ariz.Rev.Stat.Ann. § 13-453(E)(6) provides for yet another aggravating factor:

> 6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

The presence of any one of these three elements is sufficient to show the existence of this circumstance. *State v. Vickers*, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981); *State v. Clark*, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980).

"Cruelty" involves pain and mental and physical distress of the victims; "heinous" and "depraved" refer to the mental state of the killer as shown by his words and

actions. *State v. Clark*, supra, *State v. Tison*, supra. In *State v. Lujan*, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979), the Court defined "heinous" as "hatefully or shockingly evil: grossly bad" and "depraved" as "marked by debasement, corruption, perversion or deterioration."

It is submitted that MICHAEL POLAND and PATRICK POLAND murdered the two guards in a heinous and depraved manner. Witness Sheldon Green, the medical examiner, testified that victim Cecil Newkirk's cause of death was drowning and the probable cause of victim Russell Dempsey's death was drowning. The only reason Dr. Green qualified his opinion in the second case was because Dempsey had severe hardening of the coronary arteries and that one artery showed evidence of having been partially blocked by a clot. The bodies were found floating near the Nevada shore of Lake Mead, partially encased in canvas bags; bags which were earlier purchased by the defendants. Thus, the circumstances leading up to the guards' deaths can be deduced. The defendants placed the guards in canvas bags and dumped the bags into Lake Mead. The helpless victims were left to drown. Surely the fact that the bags were purchased with the intent to put the guards in them substantially before the actual murder indicates a depraved state of mind on the part of defendants. Moreover, drowning the victims as opposed to a quick means of death such as shooting, indicates the coldness of heart and lack of conscience that is the hallmark of a heinous mind. See *Burger v. State*, 245 Ga. 458, 265 S.E.2d 796 (1980).

Moreover, the method of death inflicted upon Russell Dempsey and Cecil Newkirk was cruel. Witness James Stewart, diving officer for the Scripps Institute of Oceanography, described what it was like to drown:

> "Well, if you are a water person, they are just scary as the devil. Your lungs feel like they are going to burst. You go into an involuntary respiratory spasm. You try to suck air."

The defense may attempt to argue that there is no evidence that the victims apprehended any imminent death and therefore the killing was not cruel. This argument conveniently neglects the fact that although the van was stopped at approximately 9:00 a.m. on May 24, 1977, the guards were not murdered until sometime during the morning of May 25. Thus, a period of nearly 24 hours elapsed from the time the guards were first robbed—a period during which Dempsey and Newkirk were justifiably in fear for their lives. Moreover, the defense stipulated that the blood found on the floor of the Purolater Van was the same type as that of one of the guards. The inference is clear that guard, Russell Dempsey, suffered violence substantially before he was drowned by the defendants. Surely the physical pain suffered by Dempsey and the mental apprehension of the guards during the robbery and the time that elapsed before they were dumped in the lake that their lives were indeed in jeopardy indicates a cruel manner of death. *Burger v. State*, supra, *State v. Tison*, supra.

Conclusion

The state has shown three aggravating factors for defendant PATRICK POLAND and two aggravating factors for defendant MICHAEL POLAND. No mitigation can outweigh any of these aggravating circumstances, and the law says the death penalty is mandatory, not discretionary. *State v. Blazak*, 114 Ariz. 199, 205-06, 560 P.2d 54, 60-61 (1977). It is respectfully submitted that the penalty of death for MICHAEL POLAND and PATRICK POLAND is appropriate in this case.

Respectfully submitted this 7 day of December, 1982.

CHARLES R. HASTINGS
Yavapai County Attorney

/s/ A. Melvin McDonald
A. MELVIN MCDONALD
Special Yavapai Deputy
County Attorney

/s/ W. Ronald Jennings
W. RONALD JENNINGS
Special Yavapai Deputy
County Attorney

/s/ Steven J. Twist
STEVEN J. TWIST
Special Yavapai Deputy
County Attorney

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

[Title Omitted in Printing]

DEFENDANTS' RESPONSE TO SENTENCING MEMORANDUM

The State of Arizona has devoted the major portion of its Sentencing Memorandum to the argument of whether or not the aggravating circumstance set forth in A.R.S. Section 13-454(E)(6) is present in this case. The State contends that the previous finding by the Arizona Supreme Court in *State vs. Poland*, 645 P. 2nd 784 (1982) that there was insufficient evidence to support such a finding in the previous case does not preclude this Court from reviewing the facts once again and entering such finding. It is the Defendants contention that such an approach is barred by the holding of the United States Supreme Court in *Bullington vs. Missouri*, 451 U.S. 430, 68 L.Ed. 2nd 270, 101 S. Ct. 1852 (1981). Furthermore, as the Defendants have argued in their original Sentencing Memorandum, it is clear that there was no additional evidence produced at trial with respect to the time period referred to by the Supreme Court that would enable this Court to conclude beyond a reasonable doubt that the murders were committed in an especially heineous, cruel and depraved manner. The State sidesteps this argument by presenting to the Court what it perceives to be new evidence in this case. In analyzing that evidence it is clear that the only material produced at the second trial which was not shown at the first trial was the evidence concerning the watch. The

State argues that somehow this is compelling evidence concerning cruelty, heineousness or depravity, when in fact, nothing could be further from the truth. The prosecution also contends that tesimony by Mr. Stewart is compelling evidence on the issue of cruelty. However, it must be borne in mind that the State has previously committed itself to the position that the guards were drugged at the time they were put in Lake Mead. The evidence of Mr. Stewart applies only to an individual who would have been conscious at the time that he was drowned and has no relevance to the situation where the guards were unconscious at the time they were placed in Lake Mead. Furthermore, a reading of Mr. Stewart's testimony does not leave one with the overall feeling that he was meaning to indicate in any respect that he was of the opinion that the guards suffered in the manner and mode of their deaths. The burden clearly is upon the State of Arizona to prove beyond a reasonable doubt the existence of this aggravating circumstance. Speculations concerning the mode and manner of the deaths are not sufficient as the Arizona Supreme Court has already pointed out. One need only look at the evidence to see that it is totally lacking as to the conditions surrounding the death of either guard in this case. Therefore, the argument of the State with respect to the cruelty aspects of this aggravating circumstance fails on a wholesale basis. What, in fact, the State of Arizona attempts to do with this issue as well as the other issues involved in this aggravating circumstance is to elevate rank speculation to the level of sound fact. This obviously they cannot do under the present status of the law.

With respect to the State's argument that mental cruelty has been demonstrated beyond a reasonable doubt, one must totally disregard specious arguments made that Mike Poland's testimony somehow describes the last twenty-four hours of the captivity of the guards. On appeal, the Supreme Court was solely unaffected by arguments that called for speculation with respect to the

manner and mode of the deaths of the guards. Nothing can change the Supreme Court's pronouncement that the difficulty in making the determination concerning the aggravating circumstance set forth in A.R.S. Section 13-454(E)(6) in this case is that there is very little evidence in the record of the exact circumstances of the guard's deaths. On the issue of heinousness or depravity, the Supreme Court noted that although the Defendants' state of mind may be inferred at or near the time of the event, we know nothing of the circumstances under which the guards were held hostage. Similarly, the Court found that cruelty had not been shown beyond a reasonable doubt because there was no evidence of suffering by the guards. The autopsy revealed no evidence that they had been bound or injured prior to being placed in the water and there was no sign of a struggle. The Court obviously was addressing the problem that continues to exist in this case concerning the manner in which the guards were held in captivity and the ultimate circumstances concerning their demise, questions which cannot be answered by the rampant speculation engaged in by the prosecution. Were the guards drugged during the entire period of their captivity? If they were, were they even aware of their plight? Furthermore, does the diagnosis of exclusion given by Dr. Green do anything to describe the actualities of the drownings or does it instead raise questions of whether or not at least one of those guards had died of a heart attack prior to being put in Lake Mead? It is impossible indeed to describe the mental horror of the last twenty-four hours of captivity because we know nothing about what occurred during this period of time. The State submits only gross speculation with respect to how the guards were treated or whether or not in fact they were even conscious of their captivity during this period of time. One cannot conceivably arrive at the conclusion that the State of Arizona has proven beyond a reasonable doubt that, in fact, the last twenty-four hours of the guards' lives was the mental horror

which it has depicted it as being. Once again, this Court must bear in mind that the Supreme Court alluded to the fact that there was very little evidence in the record of how the guards were held or the circumstances of their captivity that would justify any conclusions concerning either cruelty or depravity. Nothing has been produced by the State to show any of the activities occurring between the kidnapping on I-17 and the events occurring at Lake Mead. The State seeks to suggest by innuendo that some violence may have occurred because of the existence of bloodstains in the back of the Purolator van. Their suggestion is inconsistent with the testimony of the coroner in this case who indicated that the guards had not been injured prior to being placed in the water and that, in fact, any injury which he saw at the time that the bodies were autopsied was the result of post mortem occurences. In short, we do not know how the blood got there or when it got there or whose blood it is. We do know, however, from Dr. Green, that neither of the guards suffered any serious injury prior to being placed in the water. Furthermore, the autopsy fails to reveal any evidence that the guards had been bound or that there had been any kind of struggle. These are the facts that we are limited to considering in this case. These are the facts that the State consistently chooses to disregard in favor of their version of how the event must have occurred. Clearly, the State's version does not measure up to proof beyond a reasonable doubt.

The State of Arizona places undue emphasis on the testimony of Michael Poland at the trial and tries to draw a direct relationship between that testimony and what, in fact occurred during the period of the guards' captivity. The Defendants really need not point out that no competent psychiatric or other expert testimony has been offered to buttress the State's conclusion that Michael Poland was in fact describing the guards' last twenty-four hours. The unrefuted testimony was that Michael was taken somewhere by someone shortly before

he was to appear before the Federal Grand Jury. Speculation concerning that event as it relates to the last twenty-four hours of the guards captivity is really beyond reason and the purpose is unfathomable other than to convince this Court by pleas of passion that those are the real facts to be considered. However, this Court should not be lured into the position of elevating rampant speculation into facts which could sustain the finding of the aggravating circumstances as advocated by the prosecution.

Continuing on in the same vein, the prosecution argues that the police manuals are demonstrative evidence of the scheme involved in this particular case. Their "blueprint" to the crime is both inadmissable and irrelevant to this Court's determination. As the defense has repeatedly pointed out, the prosecution is bound by the rules of evidence in this case. With respect to these manuals, they have totally been unable to provide a foundation which would warrant their admission into evidence. Furthermore, this evidence is not even relevant evidence under Rule 401 and certainly under the provisions of Rule 403, would be totally inadmissable because of confusion or prejudice. The prosecution advances certain innuendos that are not appropriate to this investigation and certainly do not have any place here because of the rank inadmissability of the manuals and the speculation attendant to their use for the purpose which the prosecution advances.

Furthermore, the effects of these crimes on the spouses of the guards is not a relevant consideration here. The defense contends that the matters are not within the definition of A.R.S. Section 13-454(E)(6) handed down by the Arizona Supreme Court and is nothing but a baldface appeal to passion in an attempt to prejudice this tribunal against the Defendants and thus deprive them of a fair hearing at this juncture of the case. In the same vein are the final arguments of the memorandum which attempt by loose logic to put forth the necessity

for the death penalty in this particular case. As this Court is aware, it is legally mandated to assess the proper sentence to be imposed, taking into consideration all of the admissable evidence and determining whether or not the State has met its burden of proving the existence of certain aggravating circumstances beyond a reasonable doubt. Passion and appeals to prejudice have no part in this determination. There are no new facts in this case that would have any impact upon the Supreme Court's prior pronouncements with respect to the existence of the aggravating circumstances set forth in A.R.S. Section 13-454(E)(6). The prosecution has always known of the facts which were provable. All they have done here is to supply additional speculation by which they seek to elevate to fact their misplaced conclusions concerning the evidence.

The arguments which the prosecution makes with respect to the still remaining aggravating circumstances have been adequately dealt with in the Defendants sentencing memorandum filed on January 19, 1983. Nothing that the prosecution has presented here would in any way vary the arguments previously made and the Defendants will rely upon those arguments in Court. It is their contention that these aggravating circumstances have not been proven beyond a reasonable doubt.

In conclusion, the Defendants contend that the arguments advanced here are the same ones that have been previously made before this Court and before the Supreme Court of Arizona. The difference in the presentation of the prosecution does not lie in the facts proven at trial, but in the attempt by speculation, innuendo and suggestion to convert what, in fact, are not facts in this case into something more than what they really are. Proof beyond a reasonable doubt does not mean in this case that the prosecution can willy-nilly disregard the actual facts demonstrated in favor of some gross speculations concerning what they wish the facts to be.

Finally, the prosecution has argued that the mitigating facts in this case are not sufficiently substantial to call for leniency. It would appear that the State is contending that because none of the statutorily referenced mitigating circumstances have been found, that no other mitigating circumstances arise to the level of calling for leniency. What, in fact, the State of Arizona appears to be doing is calling for this Court to disregard the mandate of *Lockett vs. Ohio*, 438 U.S. 586 (1978) and *Eddings vs. Oklahoma*, —— U.S. ——, 71 L.Ed 2nd 1 (1982), in which the Supreme Court of the United States made it clear that all mitigating circumstances are to be given serious consideration by the trial court in a case involving the potential for the death sentence. The prosecution simply chooses to ignore the existence of mitigating circumstances which are amply demonstrated by the record by choosing to couch that evidence in terms of "good old boy" evidence and testimony. Such a cynical view of the evidence must be and should be totally disregarded by this Court. The Defendants have amply shown mitigating circumstances do exist in this case which demand that leniency be afforded to the Defendants at the time of sentencing.

RESPECTFULLY SUBMITTED this 15th day of January, 1983.

BOYLE, EATON & PECHARICH

By /s/ Wm. Lee Eaton
WM. LEE EATON

LAW OFFICES OF
JOHN STALLINGS

By /s/ John C. Stallings
JOHN C. STALLINGS

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IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

[Title Omitted in Printing]

SPECIAL VERDICT

Pursuant to the requirements of A.R.S. § 13-454 C; Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2955, 51 L.Ed 2d 973 (1978); and State v. Watson, 120 Ariz. 441, 586 P 2d 1253 (1978), this court returns this special verdict of its findings of the existence or non-existence of aggravating circumstances set forth in § 13-454E and of any mitigating circumstances.

AGGRAVATING CIRCUMSTANCES

The only information which has been considered by this court relevant to any of the aggravating circumstances set forth in § 13-454E is that received in evidence at the trial and at the sentencing hearing.

A. The court considers the statutory circumstances as follows:

1. The court finds the aggravating circumstances as follows:

1. The court finds the aggravating circumstance in § 13-454 E(1) is not present.

2. The court finds the aggravating circumstance in § 13-454 E(2) is not present as to Michael Poland, but is present as to Patrick Poland in that on October 5, 1981, Patrick Poland was convicted of bank robbery and use of a dangerous weapon in a bank robbery in violation of Title 18, U.S.C. § 2113(a) and (d), in U.S. District

Court, affirmed by the 9th Circuit Court of Appeals on August 16, 1982. Certiorari denied by the U.S. Supreme Court on November 23, 1982.

3. The court finds the aggravating circumstance in § 13-454 E(3) is present. The evidence shows the defendants received something of pecuniary value, cash in the amount of $281,000.00. The murders were not committed incidentally or accidentally to the robbery, on the contrary they were intentionally and premeditately committed solely for a financial motive.

4. The court finds the aggravating circumstance in § 13-454 E(4) is present. In making this finding, the court is not unmindful of State v. Poland, —— Ariz. ——, 645 P2d 784, and reviewed that case in light of the evidence in this trial and the other Supreme Court guidelines.

The cause of death was by drowning. The victims were kidnapped on I-17 in southern Yavapai County, they were transported to Lake Mead. Some 24 hours later they were placed in canvas bags, taken onto the lake and dropped in the water to drown. The culmination of months of planning. The executed plan shows the state of mind of the defendants and that such killings were especially hienous and depraved.

In applying this provision, the Arizona Supreme Court has said that these words have meanings that are clear. The evidence shows that the killings were carefully planned and cold blooded. This, by itself, is not sufficient, however, as pointed out in St. v. Madsen 125 Ariz. 346, 609 P2d, 1046.

But the facts show the murders were shockingly evil, insensate, and marked by debasement.

The Defendants argue that the State has not shown the victims suffered pain, or that they were not drugged. The killings were cruel whether the victims were drugged or not.

The guidelines of State v. Knapp 114 Az. 531, 562 P2d 704 and State v. Gretzler, No. 3750-2 (Jan. 6, 1983)

closely reach this case. In *Knapp* the victims were incinerated. The autopsy showed there was carbon monoxide poisioning as well, a painless death. In Gretzler there was mental distress visited upon the victims. In the case *sub judice*, the nature of the killing itself is sufficient to set it aside from the norm. Holding the victims captives, placing them in specially made canvas bags and dropping them to a slow, painful and terrifying death is grossly bad, sadistic and perverse.

MITIGATING CIRCUMSTANCES

All information relevant to any mitigating circumstances, including, but not limited to, those set forth in § 13-454 (F), contained in the presentence report, presented at the sentencing hearing, and received in evidence at the trial of the defendants has been considered by the court.

A. The court considers the mitigating circumstances as follows:

1. The defendants' capacity to appreciate the wrongfulness of their conduct or to conform to the requirements of las was not significantly impaired. The mitigating circumstance of § 13-454(F)(1) is not present.

2. The defendants were not under unusual and substantial duress. The mitigating circumstance of § 13-454(F)(2) is not present.

3. There is no evidence or information of any kind to permit the court to find the defendants' participation in the murders was relatively minor. The mitigating circumstance of § 13-454(F)(3) is not present.

4. There is no evidence or information of any kind to permit this court to find that the defendants could not reasonably foresee that their conduct in the course of the commission of the offense for which they were convicted would cause or would create a grave risk of causing death to another person.

The mitigating circumstance of § 13-454(F)(4) is not present.

5. The defendants' previous reputation for good character is not a mitigating circumstance for the reputations were false. Patrick Poland was convicted of the crime of bank robbery with a dangerous weapon committed on July 30, 1976. Both Michael Poland and Patrick Poland were in debt and conducted their business affairs in a manner to deceive. They admit to crime.

6. The close family ties that exist between the defendants, their families, and their children is a mitigating circumstance.

7. The court has considered the ages of the defendants. Michael Poland is 42 years old. Patrick Poland is 32 years old.

8. The defendants have conducted themselves as model prisoners during the pendency of these proceedings, trials and appeals; such conduct is a mitigating circumstance.

All references in this Special Verdict to the Arizona Revised Statutes are to the sections of those statutes as they were numbered at the time of the commission of the offense and prior to October 1, 1978.

DATED this 3rd day of February, 1983.

/s/ Paul G. Rosenblatt
PAUL G. ROSENBLATT
Presiding Judge-Division One

SUPREME COURT OF ARIZONA
In Banc

No. 4970-2

STATE OF ARIZONA, APPELLEE

v.

PATRICK GENE POLAND, APPELLANT

March 20, 1985

OPINION OF THE COURT

CAMERON, Justice.

In *State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982) (*Poland I*), we reversed defendant Patrick Poland's convictions for two counts of first degree murder with sentences of death and remanded for a new trial. Upon remand, defendant was retried before a jury and again found guilty of two counts of first degree murder in violation of A.R.S. § 13-1105(A)(1). He was again sentenced to death. A.R.S. § 13-703. We have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4035.

Defendant raises the following questions on appeal:

1. Pretrial Issues:

   (a) Was defendant improperly denied:

      (i) a peremptory change of the trial judge?
      (ii) a change of judge for cause?

(b) Did the trial court improperly refuse to strike two jurors for cause?

(c) Did the trial court improperly refuse to allow testimony by an expert on eyewitness identification?

(d) Did the trial court err in refusing to suppress physical evidence obtained as the result of an alleged illegal search and insufficient search warrant?

2. Trial Issues:

(a) Did the trial court err in admitting into evidence defendant's prior conviction for bank robbery?

(b) Was the prior testimony by hypnotized witness, Stanley Sekulski, improperly read to the jury?

(c) Did the trial court commit reversible error by admitting a gruesome photograph into evidence?

(d) In light of our prior ruling in Poland I, supra, that a taser gun was improperly admitted into evidence, did the trial court improperly admit a receipt showing that weapon's purchase, the box for the weapon, and testimony thereon.

(e) Did the trial court err in failing to grant a mistrial when the prosecution introduced a previously undisclosed statement of defendant?

(f) Did the trial court err in failing to define "intent" as part of its jury instruction on aiding and abetting?

3. Death Penalty Issues:

(a) Is A.R.S. § 13-703, the death penalty statute, constitutional?

(b) Did reimposition of the death penalty constitute double jeopardy?

(c) Were the aggravating circumstances found in this case proven beyond a reasonable doubt?

(d) Did the trial court improperly refuse to consider certain mitigating factors offered by defendant?

(e) Is defendant's sentence proportional to sentences imposed in similar cases in Arizona?

The facts necessary for a determination of this matter on appeal are as follows: [1]

At approximately 8 A.M. on 24 May 1977, a Purolator van containing some $328,180 in cash left Phoenix on a routine delivery to banks in various towns in northern Arizona. When the van failed to make its deliveries, the authorities were notified. The abandoned van with some $35,150 in cash was discovered early the next day a short distance off Highway I-17.

The evidence revealed that on the morning of 24 May 1977, a number of passing motorists had noticed a Purolator van pulled over to the side of Highway I-17 by what appeared to be a police car. Some witnesses identified the two uniformed men as Michael and Patrick Poland. The evidence also showed that on 24 May 1977, Michael and Patrick Poland borrowed a pickup truck and tarpaulin from their father, George Poland. Early on 25 May 1977, Michael Poland rented a boat at the Temple Bar Marina on Lake Mead. He stated that he planned to meet his brother Patrick at Bonelli Landing, a primitive camping area on the Lake, and to do some fishing. At some point, George Poland's truck became stuck in the sand at the water's edge at Bonelli Landing with the tailgate facing the water. After their at-

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[1] These facts are identical to the statement of facts in *Poland I*, supra.

tempts to extricate it had failed, the Polands called a towing service. Stan Sekulski was the operator of the tow truck. A few days later, the Polands returned their father's truck with a new tarp, explaining the old one had been ruined when they placed it under the wheels of the truck for traction.

Three weeks later, the body of Cecil Newkirk, one of the guards of the Purolator van, surfaced on Debbie's Cove, a small inlet on the Nevada side of Lake Mead. The body was partially covered by a canvas bag. A week later, park rangers searching the area discovered the body of the other Purolator guard, Russell Dempsey, a short distance from the place Cecil Newkirk's body had been found. Autopsies revealed that the most probable cause of death was drowning, although in the case of Mr. Dempsey the pathologist was unable to rule out a heart attack as a possible cause of death. The bodies had been in the water two weeks or longer. There was no evidence that the guards had been wounded or tied before being placed in the water. Although it was impossible to determine whether they had been drugged, there was no evidence of a struggle. Divers searching the area recovered two other canvas bags, one containing a tarp and blanket. They also brought up two revolvers, which were identified as belonging to the guards, and a license plate bearing the insignia found on Arizona Department of Public Safety automobiles. These were found near a pile of rocks which had evidently fallen out of the bag when it was recovered by a diver. The rocks were of the type found along the shore of Debbie's Cove.

Searches of the homes of Michael and Patrick Poland on 27 July 1977 revealed a number of weapons, including a taser gun, large amounts of cash, and items of police-type paraphernalia. Of particular interest were a scanner and scanner key which were capable of monitoring radio frequencies, a notebook listing local police frequencies, a receipt for a taser gun bearing the name

Mark Harris, handcuff cases, and a gunbelt. Both of the Polands' rented cars, light-colored Chevrolet Malibus, had siren-type burglar alarms which could be activated from inside or outside of the car. Evidence also connected the Polands to the purchase of a "light bar" or rack which could be placed on top of an automobile and would resemble a law enforcement light bar or rack. The canvas bags found in the lake were shown to have been purchased by a Mark Harris.

Although neither Michael nor Patrick Poland had regular employment, the evidence showed that they made numerous large purchases during June and July of 1977. These purchases included appliances, furniture, motorcycles, and a business. Most of the purchases were made in cash or by a cashier's check.

The defense was alibi. Patrick took the stand and testified that both he and his brother had disguised themselves as law enforcement officers and robbed drug dealers on three occasions in early 1977. They testified that they had also been dealing in gems for several months prior to the Purolator incident and that, on 24 May 1977, they had taken a load of raw turquoise to Las Vegas and returned by way of Lake Mead to do some camping.

Michael and Patrick Poland were convicted. They appealed and we reversed and remanded based upon jury misconduct. *See Poland I*, supra. On remand, defendants were again convicted and sentenced to death. We consider the appeal of Patrick Poland.

PRETRIAL ISSUES

a. Change of Judge

The mandate in *Poland I* was filed in this Court and mailed to the Yavapai County Superior Court on 26 May 1982. On 8 June the county attorney moved to dismiss the case. The motion to dismiss was not heard until 21 June, at which time it was denied. On 19 July, special deputies were appointed to prosecute and defend-

ant filed motions for change of judge pursuant to Rule 10.2, Arizona Rules of Criminal Procedure, 17 A.R.S., and to disqualify the judge for cause pursuant to Rule 10.1, Arizona Rules of Criminal Procedure, 17 A.R.S. These motions were heard and denied by another judge. The peremptory challenge motion was denied because it was untimely, and the change of judge for cause motion was denied because bias or prejudice was not shown.

i. Peremptory Change of Judge

We first consider defendant's contention that the trial court committed reversible error in denying his peremptory motion for a change of judge. Our rule regarding change of judge upon request states:

> a. Entitlement. In any criminal case in Superior Court, any party shall be entitled to request a change of judge.
>
> * * * *
>
> c. Time for Filing. A notice of change of judge shall be filed, or informal request made, within 10 days after any of the following:
>
> * * * *
>
> (2) Filing of the mandate from an Appellate Court with the clerk of the Superior Court;

Rule 10.2(a), (c)(2), Arizona Rules of Criminal Procedure, 17 A.R.S.

Our *Poland I* mandate was filed and mailed on 26 May 1982. The parties agree that defendant had 15 days, (10 days pursuant to Rule 10.2, supra, and 5 days for mailing pursuant to Rule 1.3, Arizona Rules of Criminal Procedure, 17 A.R.S.) to move to disqualify the judge without cause. The motion was not made until 19 July, some 54 days after the issuance of the mandate. This was too late and the motion was properly denied as untimely.

Defendant contends, however, that strict compliance with the rule should be waived because he relied upon the State's 8 June motion to dismiss and, therefore, did not believe that he would go to trial. Had the motion to dismiss been granted, a motion for change of judge would have been unnecessary.

Admittedly, strict compliance with a rule like ours can be waived where the peremptory challenge is made diligently and as soon as practicable. *Smith v. State*, 616 P.2d 863, 865 (Alaska 1980) ("Insofar as each challenge was made almost immediately after the parties learned of the judicial assignment for trial, it cannot be said that their rights to challenge were waived through untimeliness."), *Riley v. State*, 608 P.2d 27 (Alaska 1980) (strict compliance was waived where counsel exercised the challenge promptly upon being appointed). In the instant case, however, defendant did not act diligently to protect his peremptory challenge rights. The motion to dismiss did not extend the time for filing the motion for change of judge. We find no reason to waive the time limits of the rule.

Furthermore, by participating in these hearings, defendant waived his peremptory challenge rights pursuant to Rule 10.4(a), Arizona Rules of Criminal Procedure, 17 A.R.S., which provides in pertinent part that "[a] party loses his right under Rule 10.2 to a change of judge when he participates before that judge in any contested matter in the case, [or] * * * any pretrial hearing * * *." In other words, if a party participates in a hearing which involves a contested issue of law or fact, the right to a peremptory challenge of the judge is waived. *Itasca State Bank v. Superior Court*, 8 Ariz.App. 279, 445 P.2d 555 (1968). The hearings in this case involved contested issues insofar as the parties disagreed on the important question of whether the requested dismissal would be with or without prejudice. This case can then be distinguished from *City of Sierra Vista v. Cochise Enterprises, Inc.*, 128 Ariz. 467, 626 P.2d 1099 (App.1979), in which it

was held that a hearing on a stipulated, and therefore uncontested, motion to dismiss with prejudice did not result in a waiver.

ii. Change of Judge for Cause

Defendant next maintains that he was denied a fair trial because the judge who sentenced him to death in *Poland I*, *supra*, presided over his retrial. He argues that his motion for change of judge for cause, therefore, should have been granted, or alternatively, that it was error for the trial judge not to have recused himself. We do not agree for two reasons.

First, the motion was not timely. Rule 10.1(b), Arizona Rules of Criminal Procedure, 17 A.R.S., states:

> Within 10 days after discovery that grounds exist for change of judge, but not after commencement of a hearing or trial, a party may file a motion verified by affidavit of the moving party and alleging specifically the grounds for the change.

The ground for the change was the judge's participation in the prior trial. This was known at the time of remand. Admittedly, defendant may not have known the judge was to retry the case at that time. The defendant was aware, however, of the judge's participation by the time of the first hearing on the motion to dismiss on 21 June. Defendant's motion for change of judge filed 19 July came too late.

Second, even assuming the timeliness of the motion to disqualify, its denial was still correct. Defendant relied upon *State v. Vickers*, which states:

> We have held that even though the judge had prior knowledge of defendant's past bad acts, he need not disqualify himself, so long as the facts are those which would ordinarily be found in a presentence report and the defendant knew the factual basis upon which the judge imposed the sentence. In a death

> penalty case, however, which is treated differently from non-death penalty cases, we believe that there is an appearance of impropriety when a judge who has sentenced the defendant to death in a prior case, also tries the same defendant for another potential death penalty offense. The judge should have recused himself from trying this defendant for the second murder.

138 Ariz. 450, 452, 675 P.2d 710, 712 (1983). (Citations omitted.) In *Vickers*, however, the judge had sentenced the same defendant to death in a prior but different murder case. Unlike the case before us, which involves the same crimes on retrial, *Vickers* involved death sentences for two distinct crimes. We did not believe that the judge in *Vickers* would be able to put aside the bias that he would have because of knowledge of the facts of the other crime. In the retrial of the same crime by the same judge, however, there is only the repetition of the same facts—the same facts that would be heard by any judge who tries the case. Under these circumstances, it can not be said that the prior trial prejudiced the judge the second time around. We find no error.

b. Refusal to Strike Jurors

Defendant argues that the court erred in refusing to strike two jurors for cause.

John Matthews testified on voir dire that he had heard and read about the case from T.V., radio, and newspapers. He answered the court's questions as follows:

> BY THE COURT:
>
> Q Do you remember any of the specifics of any of the accounts that you have seen on television or heard on or about radio?
>
> • • • •

A Well, just that they were going to retry them, have a retrial.

Q So you are aware this is a retrial?

A Yes, right.

Q Now going back to the earlier accounts that you had seen and as you followed the case, in that period of time did you form any opinion of your own concerning the guilt or the innocence of the Defendants?

A I would say so.

* * * *

Q Do you understand if you were picked as a juror in this case it would be necessary for you to decide this case only on the evidence and the testimony presented here in the courtroom?

A Yes.

Q And that you would have to put from your mind anything that you had seen or heard or read or knew about the case in any form whatsoever?

A Yes.

Q Do you understand that?

A Yes.

Q Do you feel you could do that?

A I probably could.

Q Do you feel you could fairly and impartially judge this case solely on what was presented to you here in this courtroom in this trial?

A Probably could.

Q And that you could, when you went to the jury room, if you were a member of the jury, not discuss anything that took place prior or permit anyone else to talk to you about anything that took place prior?

A Probably could.

Q You could do that?

A Probably.

In response to the prosecutor's question, the juror testified that he would be able to vote not guilty if the State failed in the burden of proof.

In response to the question of defendant's counsel:

Q Haven't you told the Judge that you previously formed an opinion that Michael and Patrick Poland were guilty based on what you had read and seen about the case?

* * * *

A He was found guilty in the first case.

Q Right. And is the fact that they were found guilty in the first case, is that going to somehow influence your decision if you sit as a juror in this case?

A No.

Q You can totally wipe that out of your mind?

A Well, as far as I know.

* * * *

Q Do you realize, Mr. Matthews, that anyone who is charged with a crime is presumed innocent by the law until proven guilty beyond a reasonable doubt?

A Yes, sir.

* * * *

Q Let me ask you one more question: as you sit here today and you look at these Defendants, knowing what you know about the case, knowing about the prior proceedings, do you have any feeling in your mind that these men are guilty?

A No.

The other juror objected to by defendant, Cynthia Dea Benavidez, testified as follows:

BY THE COURT:

Q Mrs. Benavidez, you indicated you had seen or heard or read or know something about this case, is that right?

A Yeah, I have seen on T.V. news and stuff.

Q Okay. You have seen it on T.V.

* * * *

A Yes.

Q And when would that have been, ma'am?

A Oh, I don't know the exact time. Just when the trials come up and, you know, what you see on T.V. news.

* * * *

Q Okay. Do you realize if you were selected as a member of this jury you would have to decide guilt or innocence based only on what was presented here in this courtroom?

A Yes, that's what I know.

Q And do you think you could do that?

A No.

Q You don't think you could put all the things you have seen out of your mind and decide this case only on the evidence and testimony presented here in the courtroom?

A Well, maybe I could, because I really haven't followed that close, but I just—

Q I know it's a tough question.

A But just from what I know I thought they were guilty.

* * * *

Q I know this is tough. We have to look into your mind.

A I think I have already formed an opinion, but I—I don't know that much about Court and stuff, you know.

Q Well, in a Court you would have an opening statement presented by both sides in the action, you would have witnesses who would be placed under oath and take the stand and sit where you are sitting, they would be asked questions. After all the evidence and testimony had been presented, then the lawyers would argue the case and the evidence as they saw it, and then I would instruct you on the law that governs this case and it would be your duty to follow that law, and then and only then would you go into the jury room with the other jurors and decide the case. Do you think you could do that or do you think you could not?

A I think I could.

The prosecutor and attorneys for defendant also questioned Cynthia Dea Benavidez as follows:

BY THE PROSECUTOR

Q Would you be able to fairly and impartially judge the case so that at the end of the case if the State had proved the Defendants guilty beyond a reasonable doubt you could find them guilty, and if the State has failed in its burden you would find them not guilty? Could you do that?

A Sure, if I sit and listen to it all I'm sure my mind could still be open.

Q Okay. Could you—do you think you would have the ability, and I am sure having watched television, that occasionally people—memories will come back, programs you saw something on television that a witness is talking about now. Would you be able to set aside that which you saw on television and judge each witness and-their performance and their testi-

mony and their evidence and base your decision only on that evidence and nothing else?

A Yes, I could, because I don't really remember that much about it.

* * * *

BY DEFENDANT'S ATTORNEY

Q All right. And you do understand that Michael and Patrick Poland have the right to a fair trial?

A Yes I understand. I know the system. I'm thankful for that.

Q Right. And that if the State hadn't proved its burden, then all that you had heard, all that you had read, could not be used to otherwise convict them. Do you understand that?

A Yes.

* * * *

Q If you were charged with murder, ma'am, would you feel comfortable having someone with your frame of mind and knowing what you know sitting on the jury and judge you?

A No.

Q You think what you know is going to influence, even subsconsciously, your verdict in this case?

A I don't—well, like—um—if I had to sit and listen to everything, you know, then make an opinion, it might be different.

Q But right now if you were being tried for murder you wouldn't want someone with your frame of mind judging you?

A Well not from what I have already saw.

Q That's what I mean.

A No.

* * * *

BY THE COURT:

Q The bottom line, Mrs. Benavidez, has to be whether or not you feel if you were on the jury you could judge this case solely on the evidence and testimony presented here in the courtroom and on that basis render a verdict?

A I think I could do that.

We have held that because a juror has preconceived notions or opinions does not necessarily render him incompetent to fairly and impartially decide a case. *State v. Clabourne*, 142 Ariz. 335, 690 P.2d 54, 63 (1984); *State v. Tison*, 129 Ariz. 526, 533, 633 P.2d 335, 342 (1981), cert. denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982). If a juror is willing to put aside his opinions and base his decision solely upon the evidence, he may serve. *See Clabourne*, supra; *State v. Greenawalt*, 128 Ariz. 388, 394, 626 P.2d 118, 124, cert. denied, 454 U.S. 848, 102 S.Ct. 167, 70 L.Ed.2d 136 (1981). The voir dire may be used for the purpose of rehabilitating a juror by convincing him of his responsibility to sit impartially. *Clabourne*, supra; *State v. Clayton*, 109 Ariz. 587, 593, 514 P.2d 720, 727 (1973).

We will not set aside a ruling upon a challenge to a juror absent a clear showing that the trial court abused its discretion. *State v. Montano*, 136 Ariz. 605, 607, 667 P.2d 1320, 1322 (1983). Because the record shows the contested jurors were adequately rehabilitated through the voir dire, the trial court did not abuse its discretion in failing to strike them. We find no error.

c. Expert Eyewitness Identification Testimony

Prior to trial, the State moved to suppress expert testimony regarding eyewitness identification. The trial court granted the motion. Defendant argues that the trial court abused its discretion in not allowing the presentation of expert testimony on eyewitness identification. We do not agree.

The test for preclusion of expert testimony "is whether the subject of inquiry is one of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness * * *." *State v. Owens*, 112 Ariz. 223, 227, 540 P.2d 695, 699 (1975). Expert testimony on eyewitness identification is usually precluded because it invades the province of the jury to determine what weight or effect it wishes to give to eyewitness testimony. It is usually not a proper subject for expert testimony.

We have, however, previously sanctioned the use of expert testimony on eyewitness identification:

> The admissibility of expert testimony is governed by Rule 702, Ariz.R. of Evid. That rule states:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> In what is probably the leading case on the subject, the Ninth Circuit affirmed the trial court's preclusion of expert evidence on eyewitness identification in *United States v. Amaral*, 488 F.2d 1148 (9th Cir.1973). In its analysis, however, the court set out four criteria which should be applied in order to determine the admissibility of such testimony. These are: (1) qualified expert; (2) proper subject; (3) conformity to a generally accepted explanatory theory; and (4) probative value compared to prejudicial effect. *Id.* at 1153. We approve this test and find that the case at bar meets these criteria.
>
> We recognize that the cases that have considered the subject have uniformly affirmed trial court rulings denying admission of this type of testimony.

> However, a careful reading of these cases reveals that many of them contain fact situations which fail to meet the Amaral criteria or are decided on legal principles which differ from those we follow in Arizona.

State v. Chapple, 135 Ariz. 281, 291, 660 P.2d 1208 (1983). Our holding in *Chapple* was limited to the peculiar facts of that case. As we noted, "[n]o direct or circumstantial evidence of any kind connect[ed] defendant to the crime, other than the testimony of [the eyewitnesses] * * *." *Id.* at 285, 660 P.2d at 1212 (footnote omitted). We specifically stated, however, that "The rule in Arizona will continue to be that in the usual case we will support the trial court's discretionary ruling on admissibility of expert testimony on eyewitness identification." *Id.* at 297, 660 P.2d at 1224. *See also People v. McDonald*, 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709 (1984) (adopting the rule of limited usage outlined in *Chapple*); Note, *Expert Testimony on Eyewitness Identification: Invading the Province of the Jury?*, 26 Ariz.L.Rev. 399 (1984) (cautioning against the widespread use of such testimony). Under the facts of this case, the trial court did not abuse its discretion in refusing to allow the introduction of expert testimony on eyewitness identification. The peculiar facts of Chapple were not present in the instant case. The question of guilt did not hinge solely on the testimony of eyewitnesses. There was nothing that the witness would testify to that was not within the common experience of the jurors. *State v. Owens*, supra, 112 Ariz. at 227, 540 P.2d at 699. The probative value of the testimony did not overcome the prejudicial effect. *Chapple*, supra. We find no error.

d. Suppression of Material Evidence

During the investigation of the crimes, an FBI agent learned that the home Michael Poland had been renting was for sale. Posing as a buyer, the agent went through

the house and later testified as to what he saw. Defendant claims this was an illegal entry. Defendant also questions the sufficiency of an affidavit in support of a search warrant.

We considered the same issues based upon the same facts in the prior case, *Poland I*, 132 Ariz. at 277-78, 645 P.2d at 792-93. We found no error then and we find no error now.

TRIAL ISSUES

a. Prior Conviction

Defendant contends that the trial court abused its discretion by allowing defendant to be impeached with a prior felony conviction for bank robbery.

Our Rules of Evidence state in pertinent part:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record, if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, and if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement, regardless of the punishment.

Rule 609(a), Arizona Rules of Evidence, 17A A.R.S. Defendant does not assert that his prior conviction is not governed by this rule or that it was too remote in time to be used. Rather, he claims that the trial court did not make the requisite finding that the probative value of using the prior conviction for impeachment purposes outweighed any prejudicial effect.

In making the motion to preclude the use of the prior conviction, defendant's attorney stated:

> Our motion is based on Rule 609 of the Arizona Rules of Evidence. The primary thrust of our mo-

> tion is that the *potential for prejudice in introducing this prior conviction will outweigh any probative value it might have for impeachment purposes.* The main fear that I have is that the jury will utilize this conviction as substantive evidence of guilt rather than utilizing it for the limited purpose of deciding the truthfulness or non-truthfulness of any testimony that the witness offers. (Emphasis ours.)

After argument on the motion, the court took the matter under advisement and then ruled as follows:

> The rulings I'm prepared to make are that the Defendants' motion to preclude the use of the prior conviction is denied.
>
> I have spent a good deal of time reviewing this motion and the arguments and the opposition to it. I believe that, under the rules, that the use of that prior conviction can be used to impeach the Defendant if the Defendant elects to testify.

We agree that the preferred method for complying with Rule 609 is a specific on-the-record finding that the probative value of using a prior conviction for impeachment outweighs the danger of unfair prejudice. *State v. Hunter*, 137 Ariz. 234, 237, 669 P.2d 1011, 1014 (App. 1983); *State v. Dixon*, 127 Ariz. 554, 558, 622 P.2d 501, 505 (App. 1980). Where, however, it is clear from a reading of the record that the probative value has been balanced against the prejudice, a specific finding need not be made. *See State v. Ellerson*, 125 Ariz. 249, 252, 609 P.2d 64, 67 (1980). It appears that the trial judge in the instant case did balance the probative value against the potential prejudicial effect. The decision whether to admit evidence of the prior conviction for impeachment purposes was within the sound discretion of the trial court. *State v. McElyea*, 130 Ariz. 185, 188, 635 P.2d 170, 173 (1981). We find no abuse of that discretion. *Id.*

Neither do we believe that the trial judge ruled incorrectly. Because defendant relied upon an alibi defense, impeachment evidence was vitally important to the State. The significance of such evidence in similar situations has been recognized. *See State v. Gillies*, 135 Ariz. 500, 507, 662 P.2d 1007, 1014 (1983). We find no error.

b. Hypnotized Witness

Stanley Sekulski, the tow truck operator who pulled the truck out of the sand at Bonelli Landing, was a potential witness against the defendant. He had been hypnotized prior to trial. For other reasons, he was found incompetent to testify. Instead the testimony he gave at defendant's first trial was read to the jury. This testimony was first edited, however, to reflect solely the recall he had prior to his being hypnotized during the investigative phase of the case. This was done by using the pre-hypnotic statements made to the police and the FBI. The cross-examination was, however, read in its entirety. Defendant maintains, nevertheless, that this procedure deprived him of the right to confront and cross-examine a witness against him, U.S. Const. amend. VI; amend. XIV. We do not agree.

First, we note that the use of former testimony is a recognized exception to the rule against hearsay whenever a witness is declared incompetent to testify or is otherwise unavailable. Rule 804(b)(1), Arizona Rules of Evidence, 17A A.R.S. In the instant case, it was agreed that the witness was in fact incompetent to testify.

Second, although a witness is rendered incompetent to testify as to the recall induced through hypnosis, he may testify to facts demonstrably recalled prior to hypnosis:

> We further minimize the risk [of using the testimony of a hypnotized witness] by requiring that before hypnotizing a potential witness for investigatory purposes, the party intending to offer the pre-

> hypnotic recall appropriately record in written, tape recorded or, preferably, videotaped form the substance of the witness' knowledge and recollection about the evidence in question so that the prehypnotic recall may be established. Such recordation must be preserved so that at trial the testimony of that witness can be limited to the prehypnotic recall. If such steps are not taken, admission of the prehypnotic recall will be error, which, if prejudicial, will require reversal.

State ex. rel. Collins v. Superior Court, 132 Ariz. 180, 210, 644 P.2d 1266, 1296 (1982). In the instant case, the trial court ruled that FBI 302 reports and Las Vegas Police Department reports met the recordation requirement. Such reports are regularly used to summarize witness interviews, and in this case, they were used to edit Sekulski's former testimony to reflect only his prehypnotic recall.

We imposed the requirement of a prehypnotic record to mitigate the danger of subsequent hypnosis contaminating testimony of facts recalled prior to hypnosis. *Id.* Although we continue to adhere to the view expressed in Collins that videotaping is the preferred method for preserving prehypnotic recall, in the instant case, the FBI and police reports adequately enabled the parties to segregate the prehypnotic recall from post hypnotic testimony. From these reports, prepared prior to any hypnotic sessions, the transcript was edited to reflect only Sekulski's prehypnotic recall. The attendant risks were further minimized through the reading of Sekulski's cross-examination in its entirety. *Id.* Furthermore, had defendant elected, he could have introduced expert testimony to show that Sekulski's prehypnotic recall was tainted by his subsequent hypnosis. *Id.* Under these facts, the risks inherent in using the testimony of the previously hypnotized witness were minimized in accordance with our decision in *Collins*. We find no error.

c. Gruesome Photographs

Defendant contends that the trial court abused its discretion in admitting two gruesome photographs into evidence. We will consider only one photograph, however, as we do not believe that the photograph of the fully clothed body of one of the victims lying face down near the area where it surfaced was gruesome.

The court found the second photograph to be gruesome and we agree. The photograph was a closeup of the torso and decomposed head of one of the victims. It shows him clad in his employer's uniform and a wristwatch. The photograph was, however, admitted because the court ruled that its probative value outweighed its prejudicial effect. Even though it was gruesome, a photograph may be admitted provided it has probative value apart from merely illustrating the atrociousness of the crime. *State v. Perea*, 142 Ariz. 352, 690 P.2d 71, 76 (1984). This is true notwithstanding the fact that neither the identity of the victim nor the manner of death are disputed. *Id.*

In the instant case, one of the victim's co-workers used the contested photograph to identify the victim by the type of uniform he was wearing. The medical examiner who performed the autopsies upon the victims testified that the photograph illustrated the difficulty he had in determining a cause of death because of decomposition. Furthermore, the photograph shows the victim with his watch on. Investigators hypothesized the time of death of the victims in reference to the time this watch stopped.

We do not believe the gruesomeness of the photograph outweighed its probative value. *State v. McCall*, 139 Ariz. 147, 157, 677 P.2d 920, 930 (1983); Rule 403, Arizona Rules of Evidence, 17A A.R.S. We find no error.

d. Admission of Taser Gun Receipt and Gun Box

In *Poland I*, supra, we held that a taser gun was improperly admitted into evidence because it was never connected to the crime. We stated, however, that the receipt

for that weapon's purchase was properly seized and admitted at trial. *Id.* 132 Ariz. at 281, 645 P.2d at 796. We explained the receipt's relevance as follows: "[t]he taser gun receipt * * * indicated that it [the gun] had been purchased by an alias or accomplice, suggesting that it may have been purchased in contemplation of the crime or by another involved in the crime." *Id.* at 280, 645 P.2d at 795. We hold that evidence showing the use of such an alias was relevant and the receipt was properly admitted.

As to the empty taser gun box, we are unable to discern its relevance. Neither do we find its admission prejudicial. *See State v. Montes*, 136 Ariz. 491, 497, 667 P.2d 191, 197 (1983). We find no error.

e. Mistrial

Defendant contends that the trial court erred in failing to grant his motion for a mistrial after the State adduced a previously undisclosed statement at trial.

Testimony was elicited at trial from prosecution witnesses that three men purchased the lightbar alleged to have been used in the commission of the crime. Because the State felt that the description of one of these men matched defendant's brother, Thad Scott Poland, he was interviewed on the evening prior to his scheduled testimony. Allegedly, he told investigators that defendant Patrick Poland revealed to him that he had purchased the lightbar. Without disclosing to defendant the nature of this witness's statements, the State presented the evidence at trial. Defendant did not object until after the witness had left the stand.

Rule 15.1(a)(1), Arizona Rules of Criminal Procedure, 17 A.R.S., provides that the State must make available to defendants relevant written or recorded statements of witnesses against them if it has such information within its control. Rule 15.6 reads:

> If at any time after a disclosure has been made any party discovers additional information or mate-

> rial which would be subject to disclosure had it then been known, such party shall promptly notify all other parties of the existence of such additional material, and make an appropriate disclosure.

We find no error for two reasons.

First, the defendant failed to object until after the witness left the stand. It was not an abuse of discretion to fail to impose sanctions under such circumstances. *See State v. Gambrell*, 116 Ariz. 188, 190, 568 P.2d 1086, 1088 (App. 1977).

Second, there was no prejudice to defendant by the alleged failure to disclose. It came as no surprise that defendant's brother would testify and there was opportunity to interrogate him regarding his proposed testimony. Furthermore, the witness discredited himself on the stand stating, "[w]ell, he [Patrick] never really said he bought the lightbar. That was my making that up basically. * * * Pat never said specifically that he'd ever bought a lightbar. That was me saying that." Any prejudice resulting from nondisclosure was further rectified during cross-examination. Under these circumstances, the error, if any, was non-prejudicial. *See State v. Jessen*, 130 Ariz. 1, 4, 633 P.2d 410, 414 (1981) (trial court did not abuse its discretion in failing to impose sanctions where no prejudice resulted from nondisclosure).

f. Definition of Intent

The court instructed the jury as follows:

> All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission are principals in any crime so committed.
>
> The defendants have produced evidence that they were not present at the time and place the alleged crime was committed. If you have a reasonable doubt whether the defendants were present at the

time and place the alleged crime was committed you must find the defendants not guilty.

Defendants cite us to the language of the statute defining aiding and abetting, A.R.S. § 13-301, which provides in pertinent part:

> "accomplice" means a person, * * *, who *with the intent to* promote or facilitate the commission of an offense:
>
> . . . .
>
> 2. Aids, counsels, agrees to aid or attempts to aid another person in planning or committing the offense.

(Emphasis added). They contend that the omission of the phrase "with the intent to" from the instruction given was error. We do not agree.

Lack of a particular instruction is not fatal where the instructions, read as a whole, adequately set forth the law. *State v. Villafuerte*, infra 142 Ariz. at 329, 690 P.2d at 48; *State v. Axley*, 132 Ariz. 383, 392, 646 P.2d 268, 277 (1982); *State v. Rhymes*, 129 Ariz. 56, 59, 628 P.2d 939, 942 (1981).

In the instant case, the jury was also instructed:

> The State must prove that the Defendants have done an act which is forbidden by law and that they *intended* to do it. You may determine that the Defendants *intended* to do the act if they did it voluntarily.
>
> . . . .
>
> A murder which is perpetrated by any kind of willful, deliberate and premeditated killing is murder of the first degree. All other kinds of murder are of the second degree. If you have a reasonable doubt about which of the two degrees of murder was committed, you must decide it was second degree murder.
>
> . . . .

> Malice aforethought may be express or implied. It is express when there is manifested a deliberate *intention* unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandon or malignant heart.

(Emphasis added).

The instruction, even though not mentioning the requisite element of intent, was sufficient when read in conjunction with an instruction that the defendant could not be found guilty in the absence of intent. *State v. George*, 95 Ariz. 366, 371, 390 P.2d 899, 904 (1964) (although element of "intent" omitted from instruction on aiding and abetting, no reversible error found where instructions, read as a whole, indicated that guilt could not be found absent the requisite intent). We believe that George is dispositive. We find no error.

DEATH PENALTY ISSUES

a. The Death Penalty Statute

Defendant contends that our death penalty statute, A.R.S. § 13-703, is unconstitutional. We have previously disposed of this question. *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27, cert. denied, 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1356 (1983); *State v. Clark*, 126 Ariz. 428, 435, 616 P.2d 888, 895, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). Furthermore, our sentencing scheme for capital cases is neither rendered unconstitutional because of its lack of jury participation, *State v. Roscoe*, —— Ariz. ——, —— ——, —— P.2d ——, ———— [No. 5831, filed 28 December 1984, slip op. at 24-25], nor because of its failure to require beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances. *State v. Carriger*, 143 Ariz. 142, ——, 692 P.2d 991, 1008 (1984).

Additionally, we believe the death penalty was properly applied to the facts of this case. The record provides substantial support for the conclusion that defendant killed, attempted to kill, or intended to kill. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); *State v. Vickers*, 138 Ariz. 450, 452, 675 P.2d 710, 712 (1983). We find no error.

b. Double Jeopardy

Defendant contends that the double jeopardy provisions of the United States and Arizona Constitutions barred reimposition of the death penalty in this case. We do not agree.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides in pertinent part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *." Our state constitution contains a similar provision. Ariz. Const. Art. II, § 10. The United States Supreme Court has held that double jeopardy consequences attach to a sentencing proceeding whenever it resembles a trial. *Billington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1980). The Court later stated, "respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding—whether death was the appropriate punishment for respondent's offense." *Arizona v. Rumsey*, —— U.S. ——, ——, 104 S.Ct. 2305, 2310, 81 L.Ed.2d 164, 171 (1984).

Defendant contends that Bullington and Rumsey bar reimposition of the death penalty in the instant case. We do not agree. In those cases, the respective defendants were sentenced to terms of imprisonment. Upon remand, each was sentenced to death. The United States Supreme Court held that the Double Jeopardy Clause barred imposition of the death penalty in those cases. These holdings were based upon the fact that the respec-

tive state sentencing procedures resembled trials. Accordingly, because each defendant was initially sentenced to a term of imprisonment, he was impliedly "acquitted" of the death penalty.

In the instant case, defendant was sentenced to death at the end of his first trial. There was no implied "acquittal" of the death penalty. *Bullington* and *Rumsey* do not, therefore, apply. *See Knapp v. Cardwell*, 667 F.2d 1253, 1264-65 (9th Cir.), cert. denied, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982).

Defendant argues, however, that he was impliedly "acquitted" of the death penalty at the appellate level because *Poland I*, supra, overturned the single aggravating circumstance upon which his previous death sentence was based, that is that the murders were committed in an especially heinous, cruel or depraved manner, A.R.S. § 13-703(F)(6). Our holding in *Poland I*, however, was simply that the death penalty could not be based solely upon this aggravating circumstance because there was insufficient evidence to support it. This holding was not tantamount to a death penalty "acquittal."

Because we find below that the "heinous, cruel or depraved" aggravating circumstance was again not adequately proven, we need not reach the question of whether double jeopardy precluded the sentencing court from refinding this aggravating circumstance.

c. Proof of Aggravating Circumstances

The trial court found as aggravating circumstances:

1. That defendant committed the crime in an "especially heinous, cruel or depraved manner." A.R.S. § 13-703(F)(6).

2. That the crime was committed "as consideration for the receipt, or in expectation of the receipt, or anything or pecuniary value." A.R.S. § 13-703(F)(5).

3. That defendant had been "previously convicted of a felony in the United States involving the use or threat of violence on another person." A.R.S. § 13-703(F)(2).

This court will, in all death cases, make an independent review of the facts to determine for itself the aggravating and mitigating factors. *State v. Smith*, 138 Ariz. 79, 85, 673 P.2d 17, 23 (1983), cert. denied, —— U.S. ——, 104 S.Ct. 1429, 79 L.Ed.2d 753 (1984); *State v. Richmond*, 136 Ariz. 312, 317, 666 P.2d 57, 62, cert. denied, —— U.S. ——, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983).

Defendant contends that the sentencing court erred in its findings that the murders in this case were "especially heinous, cruel or depraved." A.R.S. § 13-703(F)(6). We agree.

In *Poland I*, supra 132 Ariz. at 285, 645 P.2d at 800, we set aside the finding of this aggravating circumstance (then contained in former A.R.S. § 13-454(E)(6), for the following reasons:

> In interpreting the aggravating circumstance that the offense was committed in an especially heinous, cruel, or depraved manner, we have stated:
>
> > "* * * the cruelty referred to in the statute involved the pain and the mental and physical distress visited upon the victims. Heinous and depraved as used in the same statute meant the mental state and attitude of the perpetrator as reflected in his words and actions." *State v. Clark*, 126 Ariz. 428, 436, 616 P.2d 888, 896 (1980), cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612.
>
> We do not believe that the evidence so far produced in this case shows that the murders were cruel. We have interpreted "cruel" as "disposed to inflict pain esp. in a wanton, insensate or vindica-

tive manner: sadistic." *State v. Lujan*, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979), quoting Webster's Third New International Dictionary. There was no evidence of suffering by the guards. The autopsy revealed no evidence that they had been bound or injured prior to being placed in the water, and there was no sign of a struggle. Cruelty has not been shown beyond a reasonable doubt. *State v. Lujan*, supra; *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981); *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980); *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978).

Neither does the evidence support a finding that the murders were heinous or depraved. These terms were defined in *State v. Lujan*, supra:

> "heinous: hatefully or shockingly evil: grossly bad
>
> . . . .
>
> "depraved: marked by debasement, corruption, perversion or deterioration." 124 Ariz. at 372, 604 P.2d at 636.

The issue focuses on the state of mind of the killer. *State v. Lujan*, supra. The difficulty in making this determination in the case at bar is that there is very little evidence in the record of the exact circumstances of the guards' deaths. Although defendants' state of mind may be inferred from their behavior at or near the time of the offense, *State v. Lujan*, supra, we know nothing of the circumstances under which the guards were held hostage.

The State must prove the existence of aggravating circumstances beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825, cert. denied, 449 U.S. 986, 101 S.Ct. 408, 66 L.E.2d 251 (1980). We do not believe it has been shown beyond a rea-

> sonable doubt that the murders were committed in an "especially heinous, cruel or depraved manner."

At retrial, the State again failed to show what we found lacking in *Poland I:* suffering by the victims and the circumstances surrounding their deaths. The State did not show the victims were conscious at the time of death. A finding of cruelty cannot stand where the State has failed to prove beyond a reasonable doubt that the victims were conscious at the time of death. *State v. Villafuerte*, 142 Ariz. 323, 690 P.2d 42, 50 (1984). We are, therefore, compelled to again set aside the finding that the murders were committed in an "especially heinous, cruel or depraved manner."

The State has, however, proven beyond a reasonable doubt that defendant "committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5). This circumstance is applied to murders having a "financial motivation." *State v. Villafuerte*, supra at 328, 690 P.2d at 47; *State v. Graham*, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983), *State v. Clark*, 126 Ariz. 428, 436, 616 P.2d 888, 896, cert. denied, 449 U.S. 1067, —— S.Ct. 796, 66 L.Ed.2d 612 (1980). In the instant case, the murders were part of an overall scheme to obtain items of pecuniary value. *State v. Nash*, 143 Ariz. 392, ——, 694 P.2d 222, 235 (1985). Under the facts of this case, the "pecuniary gain" finding was clearly warranted.

Defendant maintains, however, that the sentencing court incorrectly found the aggravating circumstance contained in A.R.S. § 13-703(F)(2): that he "was previously convicted of a felony in the United States involving the use or threat of violence on another person." He argues that this factor should not have been found absent an examination of whether violence played a role in his prior conviction for bank robbery. This argument was most recently raised and rejected in *State v. Nash*, at

——, 694 P.2d at 234, where we held that judicial notice may be taken that certain felonies, by definition, involve violence against others. *See also State v. Watson*, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978), cert. denied, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979) ("Fear of force is an element of robbery and the conviction of robbery presumes that such fear was present.") Furthermore, defendant's claim that Double Jeopardy principles bar the use of his prior conviction to enhance sentencing is without merit. *State v. LeMaster*, 137 Ariz. 159, 166, 669 P.2d 592, 599 (App. 1983).

d. Mitigating Circumstances

The trial court found as mitigating circumstances the defendant's close family ties, and that he was a model prisoner. The trial court found that these mitigating circumstances were not "sufficiently substantial to call for leniency." A.R.S. § 13-703(E).

Defendant raises two arguments relating to mitigating circumstances. First, he argues that the sentencing court's failure to find good reputation as a mitigating circumstance was error. We do not agree.

Defendant points to numerous letters written by family members and acquaintances attesting to his good reputation. The sentencing court, however, found this evidence was contradicted by defendant's prior conviction. The court reasoned that defendant's reputation was not a mitigating factor because it was falsely built.

Defendants have the burden of proving mitigating factors by a preponderance of the evidence. *State v. McMurtrey*, 143 Ariz. 71, 72-73, 691 P.2d 1099, 1100-1101 (1984). The sentencing court and this Court on appeal may take cognizance of evidence tending to refute a mitigating circumstance. *State v. Smith*, 131 Ariz. 29, 638 P.2d 696 (1981).

In light of conflicting evidence as to defendant's reputation, we do not believe that the defendant has shown

by a preponderance of the evidence defendant's good reputation as a mitigating circumstance.

Second, defendant also claims error to the sentencing court's discussion of close family ties as a mitigating circumstance:

> The Court does find the close family ties of the—that exist between the Defendants' families and their children as a mitigating circumstance. I don't want this to be misconstrued as an opinion of this Court that this in fact made them good husbands and fathers. On the contrary, the exact opposite would be true. It would be impossible to conceive of good husbands and fathers committing crimes of this nature, and thereby bearing the aura of being a good family man. I suspect the only possible self-justification that may be available to you both is that you somehow did this for your children and families, but of course quite the opposite is the result, and you have in fact destroyed your families, and I suspect that the best thing that you could do at this point would be to admit to them that you have committed these offenses, let them face up to it, let them try to prepare their lives in a manner that will permit them to exist in the future, otherwise you have destroyed them forever.

Defendant contends that the court was using a mitigating factor as an aggravating factor contrary to *State v. Just*, 138 Ariz. 534, 675 P.2d 1353 (App. 1983) (where the sentencing court incorrectly used the defendant's prior exemplary life as an aggravating factor). We do not believe, however, that the court used defendant's close family ties in this manner. Rather, it appears that the court found this to be a mitigating factor but not "sufficiently substantial to call for leniency." *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13, cert. denied, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). We find no error.

We further find that neither defendant's age, twenty-seven at the time of the offenses, *State v. Clark*, supra; nor the fact that he was a model prisoner, *State v. Carriger*, 143 Ariz. 142, ————, 692 P.2d 991, 1010-1011 (1984), are mitigating factors sufficiently substantial to call for leniency. We believe the death penalty should be imposed in this case.

e. Proportionality

We conduct a proportionality review as part of our independent review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Villafuerte*, supra 142 Ariz. at 332, 690 P.2d at 51, *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976).

Our review indicates that defendant's sentence is proportionate to sentences imposed by this state upon other defendants who have committed murders having a similar degree of aggravation. We have upheld the imposition of the death sentence in numerous cases involving two or more aggravating factors and no mitigating factors sufficiently substantial to call for leniency. *E.g.*, *State v. Carriger*, supra; *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984); *State v. Blazak*, 131 Ariz. 598, 643 P.2d 694 (1982). We have also upheld the death penalty where as here the crime is for the sole purpose of economic gain, *State v. Hensley*, 142 Ariz. 598, 691 P.2d 689 (1984).

The fact that defendant had a prior conviction involving the use or threat of violence and that the offense was for pecuniary gain together with insufficient mitigating circumstances brings this court to the conclusion that the crime is above the norm of first degree murders and that the defendant is above the norm of first degree murderers.

We have reviewed the entire record pursuant to A.R.S. § 13-4035 and have found no reversible error. The finding that the murders were committed in an "especially heinous, cruel or depraved manner" is set aside, but the

findings as to the other aggravating circumstances are affirmed. No mitigating circumstances sufficiently substantial to call for leniency have been shown.

The judgments and sentences are affirmed.

HOLOHAN, C.J., and HAYS, J., concur.

GORDON, Vice Chief Justice (concurring in part, dissenting in part):

Regarding the disposition of defendant's peremptory change of judge claim, I concur in the result for different reasons than stated by the majority. I, however, dissent from affirming reimposition of the death sentence in this case.

We filed our mandate in *Poland I* on May 26, 1982. In the days immediately following this mandate the Yavapai County Attorney's office avowed to defendant's attorney that it would not retry the case. The County Attorney also made statements to the press expressing the same intentions. Defendant's attorney relied upon these private and public representations.

On June 8, 1982 the Yavapai County Attorney moved to dismiss the charges against defendant. On June 21, 1982, the trial court held a hearing on the prosecutor's motion where the prosecutor stated he was renewing his motion to dismiss. He argued that the state had lost contact with certain witnesses, others had died, still others were reluctant to testify, and that both defendants were serving 99 and 114 year sentences in federal prison for convictions arising from the same facts. He also questioned the admissibility of the testimony of a previously hypnotized witness. The prosecutor also noted that the FBI agent in charge of the case agreed that chances for successful prosecution were "extremely poor." Both defense attorneys joined the prosecutor's motion and asked the Court to give due consideration to a dismissal with prejudice under the state of the evidence.

Unlike the majority I believe that until the June 21st hearing, defense counsel had no need to file a peremptory change of judge notice. The County Attorney never gave any indication that he would prosecute defendant. To the contrary, he insisted he would not, and defendant's counsel had every right to rely upon these assurances. Further, defense counsel had no way of knowing that the trial judge would deny the motion to dismiss. Defense counsel could reasonably conclude, in fact, that moving for a change of judge would be futile or even antagonistic in view of the appearance that the case would not again go to trial. I believe the majority's construction of Rule 10.2, Ariz. R. Crim. P., 17 A.R.S., is too harsh because it would require defense lawyers to file notice of peremptory change of judge even when a trial seems improbable.

In addition, I disagree that by participating in the state's motion to dismiss defendant waived his right to peremptorily challenge the judge. The majority claims this hearing involved a contested matter of law or fact in that the state wanted a dismissal without prejudice while defendant suggested a dismissal with prejudice. By participating in a contested matter in front of the trial judge, defendant would waive his right to peremptorily challenge the judge. Rule 10.4(a), Ariz. R. Crim. P., 17 A.R.S.

The majority has taken a strained view of the record. My reading of the record reveals that the defendant had no objection to the state's motion to dismiss but asked the judge to consider dismissing the case with prejudice. The judge denied the motion to dismiss, and the question of whether the motion was to be with or without prejudice was never discussed or contested in any way at the hearing. A simple request by defense counsel for the judge to consider a dismissal with prejudice hardly constitutes a real contest of any legal issue.

I agree with the result reached by the majority, however, because defense counsel failed timely to file a per-

emptory challenge of the judge after the judge denied the state's motion to dismiss. Once defense counsel became aware that the trial judge wanted a trial, he could no longer reasonably rely upon the prosecutor's promise that he would dismiss the case. *See* Rule 16.5, Ariz. R. Crim. P., 17 A.R.S.; *State v. Johnson*, 122 Ariz. 260, 594 P.2d 514 (1979) (prosecutor does not have sole discretion to decide whether to dismiss; the Superior Court on good cause shown may order that a prosecution be dismissed). As defense counsel failed to file a peremptory notice of a change of judge within 10 days after the June 21st hearing, the motion was not timely.

I dissent from reimposition of the death penalty. In *Poland I* this Court reversed defendant's death penalty "conviction" for lack of sufficient evidence. The United States Supreme Court has held that such an appellate reversal is the same as a fact-finder's acquittal of the defendant. A "death penalty acquital" is final for double jeopardy purposes, and the death sentence issue should not be retried, even after an entirely new trial on the guilt or innocence issue. *See* authorities cited *infra*.

The double jeopardy rule forbids retrial of a defendant who has been acquitted of the crime charged or whose conviction is reversed on appeal because of insufficient evidence. *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). In *Bullington*, the United States Supreme Court made these principles applicable to state death sentencing proceedings when such proceedings resemble a trial. The Court later specifically held that Arizona's death sentencing procedure is a separate trial for double jeopardy purposes, thus invoking all double jeopardy protections. *Arizona v. Rumsey*, —— U.S. ——, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). In *Arizona*, therefore, if a trial court "acquits" a defendant on the ultimate issue in the death sentencing proceeding—whether to impose the death penalty—or if this Court reverses a death penalty "conviction" because

of insufficient evidence, the double jeopardy rule prohibits retrial of the death penalty issue. *Arizona v. Rumsey, supra; Bullington v. Missouri, supra.*

Our decision in *Poland I* was surely a reversal of defendant's death penalty "conviction" for insufficient evidence constituting a final acquittal of that charge. In *Poland I* the trial court found one aggravating circumstance upon which it based the death penalty: A.R.S. § 13-454(E)(6) (now § 13-703(F)(6)), that defendant committed the offense in an especially heinous, cruel, or depraved manner. Because of a mistake of law, however, the trial court failed to find the pecuniary gain aggravating circumstances, A.R.S. § 13-454(E)(5) (now § 13-703(F)(5)). On appeal, this Court thoroughly analyzed the lone aggravating circumstance supporting defendant's death penalty, and we found it nonexistent because of insufficient evidence. As a matter of common sense, then, when this Court struck down the sole aggravating factor found by the trial court to justify defendant's death penalty because of insufficient evidence, we necessarily reversed defendant's death penalty "conviction" for lack of sufficient evidence.

No other view of our *Poland I* decision is possible. As this Court does not write non-binding advisory opinions, the death sentence review in *Poland I* cannot be viewed as such. Further, even if our discussion in *Poland I* could somehow be construed as dicta, I had always believed that dicta was binding upon the parties in the case in which the dicta appears. It was certainly binding in the instant case.

The majority, however, explains our decision in *Poland I* by relying upon the law as it stood before *Bullington* and *Rumsey*. According to the majority,

> "Our holding in *Poland I*, however, was simply that the death penalty could not be based solely upon this aggravating circumstance [cruel, heinous, or depraved] because there was insufficient evidence to

support it. This holding was not tantamount to a death penalty 'acquittal'."

Though perhaps correctly characterizing our holding in *Poland I*, the majority fails to see that the disposition in *Poland I* is unacceptable under current double jeopardy rules, which apply retroactively to this case. At the time of *Poland I* it was appropriate to resentence defendant, despite this Court's nullification of the sole aggravating circumstance against him. It was appropriate, however, only because Arizona's death sentencing procedure was not then considered a separate trial for double jeopardy purposes.

The United States Supreme Court has since changed the law, and now death sentencing procedures are separate trials for double jeopardy purposes. *Arizona v. Rumsey, supra; Bullington v. Missouri, supra.* Thus, in the *Poland I* death sentencing "trial" defendant was found guilty of the charge against him—whether to impose the death penalty. One basis supported that "conviction". This Court, however, found that sole basis nonexistent because of insufficient evidence. Thus, just as in any other type of trial, when this Court finds the sole basis for a conviction unsupported by the evidence, we necessarily reverse that conviction for lack of sufficient evidence. Furthermore, just as in any other type of trial, such a reversal is a final acquittal for double jeopardy purposes. *Burks v. United States, supra; Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978) (applying *Burks* to the states). The majority's explanation of *Poland I* would allow appellate courts to reverse convictions for insufficient evidence and then remand to the trial court with instructions to convict the defendant of the same charge on another basis. Such a result cannot be correct.

Furthermore, as settled by *Rumsey*, the trial court's error in not finding the pecuniary gain aggravating circumstance at the first trial in no way justifies a second sentencing proceeding. In "acquitting" the defendant of

the death penalty, the trial judge in *Rumsey* made the exact legal error the trial judge made in the instant case. Nevertheless, this court and the United States Supreme Court held that the trial court's erroneous "acquittal" was final for double jeopardy purposes. As stated by the high court in *Rumsey:*

> "Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. '[T]he fact that "the acquital may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles" * * affects the accuracy of that determination, but it does not alter its essential character.' *United States v. Scott*, 437 U.S. 82, 98, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1978) (quoting *Id.*, at 106, 98 S.Ct. at 2201 BRENNAN, J., dissenting). Thus, this court's cases hold that an acquittal on the merits bars retrial even if based on legal error."

Arizona v. Rumsey, supra, —— U.S. at ————, 104 S.Ct. at 2310-2311, 81 L.Ed.2d at 171-172. As this Court effectively "acquitted" defendant of the death penalty in *Poland I*, reimposition of the death penalty was improper, despite the trial court's error in failing to find the pecuniary gain aggravating circumstance.

The majority, however, maintains that it has reached the correct conclusion because, unlike *Bullington* and *Rumsey*, defendant in this case was sentenced to death at the first trial.[1] If I could ignore the principle established

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[1] In support of this reasoning the majority cites *Knapp v. Cardwell*, 667 F.2d 1253, 1264-65 (9th Cir.), *cert. denied*, 459 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 621 (1982). That case, however, is inapplicable to the instant case. In *Knapp*, a class of Arizona death row inmates brought suit challenging the constitutionality of the Arizona death sentence statute and argued that, even if constitutional, its application to them violated ex post facto laws and the double jeopardy clause.

Rejecting this argument, the Ninth Circuit Court of Appeals stated:

in *Burks v. United States*, *supra*, and *Greene v. Massey*, *supra*, I might agree with the majority's argument. In *Burks* and *Greene*, however, the United States Supreme Court held that an appellate reversal for insufficient evidence has exactly the same double jeopardy effect as a jury acquittal. The *Burks* rationale is logical:

> "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instruc-

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"The present case is clearly distinguishable from *Bullington*. First, appellants in this case, unlike *Bullington*, were sentenced to death at their original sentencing. There exists no implied 'acquittal' in the case. *See Bullington*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (Justice Powell, dissenting).

* * * *

"In addition, the Arizona sentencing procedure, both before and after *Watson*, bears less resemblance to a trial than did that of Missouri. For example, the Arizona sentencing decision is made by the judge rather than the jury, and the procedure for presenting the evidence in Arizona is much less trial-like. These differences lend weight to our holding that in this case no implied acquittals have been shown to exist."

667 F.2d at 1265.

The *Knapp* reasoning is inapplicable to this case for an important reason the majority does not acknowledge: the death sentences in *Knapp* were never reversed on appeal for insufficient evidence. The death sentence in this case was reversed on appeal for insufficient evidence thus rendering it identical to a final acquittal for double jeopardy purposes. *See Burks v. United States*, *supra*.

In addition, this Court and the United States Supreme Court expressly rejected the *Knapp* analysis that our death sentencing proceeding is not like a trial. *Arizona v. Rumsey*, *supra*. *State v. Rumsey*, 136 Ariz. 166, 665 P.2d 48 (1983).

> tions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. *See Note, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. Chi. L. Rev. 365, 370 (1964).
>
> "The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty." (emphasis in the original)

Burks v. United States, supra, 437 U.S. at 15-16, 98 S.Ct. at 2149-2150, 57 L.Ed.2d at 12-13.

As explained above, our decision in *Poland I* was nothing but an appellate reversal of defendant's death penalty "conviction" for lack of sufficient evidence. As established in *Burks* and reaffirmed in *Bullington*, this reversal is exactly the same as the factfinder's acquittal of defendant on the death penalty "charge." Thus, it violated double jeopardy to retry defendant on that charge. *See Jones v. Thigpen*, 741 F.2d 805 (5th Cir. 1984) (Defendant sentenced to death at the trial court, but appellate court found insufficient evidence to support that sentence. Citing *Bullington*, *Rumsey*, *Burks* and *Greene*, the court held double jeopardy prevented state from again subjecting

defendant to death sentencing hearing in second trial.)[2] The majority's basis for distinguishing this case from *Bullington* and *Rumsey*, therefore, is erroneous because it concentrates only on the trial court decision while ignoring the important double jeopardy effects of our decision in *Poland I*.

Finally, I will address what I believe to be an unstated basis for the majority opinion. That is, in *Poland I*, this Court ordered an entire new trial, including both the guilt or innocence phase and the death sentencing phase. Thus, as both phases of trial are fundamentally connected to each other, if convicted, the defendant should be subject to a totally new sentencing in the second trial. Though I believe this position is entirely reasonable, the law as it now stands rejects this thinking.

First, *Bullington* established that death sentencing proceedings are wholly separate from the guilt or innocence phase for double jeopardy purposes. In *Bullington* the defendant was convicted of capital murder and sentenced

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[2] Though *Jones v. Thigpen, supra,* is slightly distinguishable from the instant case, the distinguishing factor makes no difference. In *Jones*, appellant's death sentence was not reversed because of insufficient evidence supporting the aggravating factors but because insufficient evidence supported a finding that Jones killed, intended to kill or attempted to kill the victim. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Thus, it was an insufficiency of *Enmund* evidence that spared Jones' life.

This difference is insignificant because, like this case, *Jones'* key issue was the state's insufficient evidence supporting the death penalty. The Jones court agreed with the defendant "that *Enmund's* is a rule of evidentiary sufficiency, and that because the State failed to produce sufficient evidence of personal culpability at the first trial it is barred by the Double Jeopardy Clause from a second chance." *Jones v. Thigpen, supra* at 814. Thus, just as I believe should be the result in this case, "if the jury under *Bullington* [the judge under *Rumsey*] or an appellate court under *Burks* finds the prosecution's evidence in support of the death penalty insufficient, the defendant cannot again be made to face a possible death sentence." *Id.* at 815.

to life imprisonment. The trial court granted a new trial on the guilt or innocence phase but refused to allow the state a second chance to attempt to sentence the defendant to death. Affirming the trial court, the United States Supreme Court held that the first death sentencing procedure was a trial for double jeopardy purposes and that the acquittal the defendant received in that trial prevented a retrial on the death sentence in the second murder trial. Thus, whether or not an appellate court grants a new trial on the guilt or innocence phase, a final acquittal in the death sentencing phase prevents a retrial of defendant on the death sentence issue.

As previously shown, then, our reversal of defendant's death sentence in *Poland I* equalled a final acquittal on that issue, and, as *Bullington* shows, that final acquittal in the first trial prevents retrial of the death sentence in the second trial.

The result I urge in this case is in no way bizarre or unheard of. It is simply a matter of logically applying existing law. Other courts have reached the exact result I argue for. In a case decided before *Bullington*, the Court of Criminal Appeals in Texas reversed the guilt or innocence phase of a defendant's trial for legal error and reversed imposition of the death penalty for insufficient evidence. *Brasfield v. State*, 600 S.W.2d 288 (Tex.Crim.App.1980). In remanding the case to the trial court, the appeals court, citing *Burks and Greene*, held that the defendant could not again be tried for capital murder where the state seeks the death penalty. The United States Supreme Court cited *Brasfield* in footnote 9 of *Bullington*.

In a case subsequent to *Bullington*, the presiding judge of the Texas Court of Criminal Appeals gave an able analysis of the situation confronting us today:

> "The evidence being insufficient to support the assessment of the death penalty, death is no longer an available penalty. *Brasfield v. State*, 600 S.W.

> 2d 288 (Tex. Cr.App. 1980); *Bullington v. Missouri*, [451] U.S. [430], 101 S.Ct. 1852, 68 L.Ed.2d 1270 (1981); *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). In a capital murder case where the evidence is insufficient to support the death penalty assessed, the reviewing court, before deciding on the proper disposition of the appeal, must determine if the guilt stage is free from reversible error. If the guilt stage is not free of such error, the cause must be reversed for such error, and upon any retrial the death penalty would not be an available penalty."

Wallace v. State, 618 S.W.2d 67, 74 (Tex. Crim.App. 1981).

Today, however, the majority holds that a death sentence "conviction" reversed on appeal for insufficient evidence invokes no double jeopardy protections. This holding is contrary to the law established in *Arizona v. Rumsey, supra; Bullington v. Missouri, supra; Burks v. United States, supra*; and *Greene v. Massey, supra* and I, therefore, dissent. Accordingly, I would reduce defendant's sentence to life imprisonment without possibility of parole for twenty-five years.

FELDMAN, Justice:

I concur in Vice Chief Justice Gordon's special concurrence and dissent.

SUPREME COURT OF ARIZONA
IN BANC

No. 4969-2

STATE OF ARIZONA, APPELLEE,

v.

MICHAEL KENT POLAND, APPELLANT

March 20, 1985.

CAMERON, Justice.

Defendant, Michael Poland, was tried before a jury and found guilty of two counts of first degree murder in violation of A.R.S. § 13-1105(A)(1). He was sentenced to death under A.R.S. § 13-703. He appealed and we reversed the conviction because of jury misconduct. *See State v. Poland*, 132 Ariz. 269, 645 P.2d 784 (1982) (Poland I). Defendant was retried, convicted and again sentenced to death. He appeals. We have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4035.

Defendant Michael Poland was retried jointly with his brother Patrick. The facts in Michael's case are the same as those set forth in the case of *State v. Patrick Poland*, —— Ariz. ——, 698 P.2d 183 filed this day. They need not be repeated here.

With the few exceptions noted below, Michael raises the same issues on appeal as does Patrick. Since we have disposed of these issues in Patrick's case, we need not

consider them again. We only note that as in Patrick's case, we found no error as to the issues raised.

We, therefore, consider only the following questions:

1. Did the trial court admit nonrelevant evidence to prove an aggravating circumstance?
2. Upon an independent review of the matter, is the imposition of the death penalty appropriate?
3. Is the imposition of the death penalty in this case disproportionate to the penalty in other first degree murder cases?

After trial, conviction and judgment of guilt, the trial judge held a hearing in aggravation and mitigation pursuant to A.R.S. § 13-703. The court found as aggravating circumstances:

a. That the offense was committed in "an especially heinous, cruel or depraved manner" § 13-703(F)(6), and

b. That the offense was committed in "consideration for the receipts, or in expectation of the receipt, of anything of pecuniary value." § 13-703(F)(5).

The court found as mitigating factors defendant's close family ties, and that he was a model prisoner. § 13-703(G). The mitigating factors were not found sufficiently substantial to call for leniency. § 13-703(E).

NONRELEVANT EVIDENCE

During the course of the trial, testimony was adduced that defendant was seen reading a manual of police procedures. Although the manual was not admitted at trial, it was admitted at the aggravation/mitigation hearing. The contested police manual discusses, *inter alia*, the use of handcuffs and chemical agents. Although use of such instruments, if proven, might have been relevant to the "heinous, cruel or depraved" aggravating circumstance of A.R.S. § 13-703(F)(6), their use was purely speculative. Since we find below that the aggravating circumstance of "heinous, cruel or depraved" was improperly found, the

admission of the manual was not prejudicial. We find no error.

INDEPENDENT REVIEW

This court will, in all death cases, make an independent review of the facts to determine for itself the aggravating and mitigating factors. *State v. Smith*, 138 Ariz. 79, 85, 673 P.2d 17, 23 (1983); *State v. Richmond*, 136 Ariz. 312, 317, 666 P.2d 57, 62, cert. denied, —— U.S. ——, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983).

A. Aggravating Circumstances

Defendant contends that the sentencing court erred in its findings that the murders in this case were "especially heinous, cruel or depraved." A.R.S. § 13-703(F)(6). From a review of the record, and for the same reasons set forth in *State v. Patrick Poland*, supra, we agree. *See also Poland I.*

The State has, however, proven beyond a reasonable doubt that defendant "committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5). This circumstance is applied to murders having a "financial motivation." *State v. Villafuerte*, 142 Ariz. 323, 690 P.2d 42, 47 (1984); *State v. Graham*, 135 Ariz. 209, 212, 660 P.2d 460, 463 (1983); *State v. Clark*, 126 Ariz. 428, 436, 616 P.2d 888, 896, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). Defendant obtained numerous items for the purpose of robbing the Purolator van and ultimately disposing of the guards' bodies. In particular, the purchase of the canvas bags in which the victims' bodies were found, indicates that their murders were contemplated during the planning of the robbery. It is clear, therefore, that these murders were part of an overall scheme to obtain items of pecuniary value. *State v. Nash*, 143 Ariz. 392, ——, 694 P.2d 222, 235 (1985).

B. Mitigating Circumstances

Defendant raises two arguments relating to mitigating circumstances. First, he argues that the sentencing

court's failure to find good reputation as a mitigating circumstance was error. We do not agree.

Defendant presented numerous letters written by family members and acquaintances attesting to his good reputation. This evidence was, however, contradicted by defendant's statements during trial that he engaged in numerous criminal activities including robbing drug dealers and selling illicit gems. Although the jury did not accept defendant's alibi that he was engaged in such a transaction at the time these offenses were committed, we are not required to ignore defendant's admissions that he had at other times engaged in criminal conduct.

Defendants have the burden of proving mitigating factors by a preponderance of the evidence. *State v. McMurtrey*, 143 Ariz. 71, 72-73, 691 P.2d 1099, 1100-1101, (1984). The court may take cognizance of evidence tending to refute a mitigating circumstance. *See State v. Smith*, 131 Ariz. 29, 638 P.2d 696 (1981). In light of conflicting evidence as to defendant's reputation, we do not believe that defendant has shown good reputation as a mitigating factor.

Defendant next attaches error to the sentencing court's discussion of close family ties as a mitigating circumstance. The trial court found the existence of this mitigating factor but stated:

> The Court does find the close family ties of the—that exist between the Defendants' families and their children as a mitigating circumstance. I don't want this to be misconstrued as an opinion of this Court that this in fact made them good husbands and fathers. On the contrary, the exact opposite would be true. It would be impossible to conceive of good husbands and fathers committing crimes of this nature, and thereby bearing the aura of being a good family man. I suspect the only possible self-justification that may be available to you both is that you somehow did this for your children and families, but of course

> quite the opposite is the result, and you have in fact destroyed your families, and I suspect that the best thing that you could do at this point would be to admit to them that you have committed these offenses, let them face up to it, let them try to prepare their lives in a manner that will permit them to exist in the future, otherwise you have destroyed them forever.

The court used defendant's close family ties as a mitigating circumstance but devalued it to the point that it was not "sufficiently substantial to call for leniency." *State v. Gretzler*, 135 Ariz. 42, 54, 659 P.2d 1, 13, cert. denied, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). We agree with the trial court—it was a mitigating factor but not substantial enough to overcome the aggravating factor. *See also State v. Patrick Poland*, supra.

We further find that neither defendant's age, thirty-six at the time of the offenses, *State v. Clark*, supra, 126 Ariz., at 437, 616 P.2d at 897; nor the fact that he was a model prisoner, *State v. Carriger*, 143 Ariz. 142, ——, ——, 692 P.2d 991, 1010-1011 (1984), are mitigating factors sufficiently substantial to call for leniency.

PROPORTIONALITY REVIEW

We conduct a proportionality review as part of our independent review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Villafuerte*, supra, 142 Ariz., at 332, 690 P.2d at 51; *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976).

Our review indicates that defendant's sentence is proportionate to sentences imposed in this state upon other defendants who have committed murders having a similar degree of aggravation. We have upheld the imposition of

the death sentence in numerous cases involving only one aggravating factor and no mitigating factors sufficiently substantial to call for leniency. *E.g., State v. Villafuerte,* supra; *State v. Chaney,* 141 Ariz. 295, 686 P.2d 1265 (1984); *State v. Smith,* 138 Ariz. 79, 673 P.2d 17 (1983), cert. denied, —— U.S. ——, 104 S.Ct. 1429, 79 L.Ed.2d 753 (1984).

In a similar case involving a murder for pecuniary gain, we stated:

> In this case, the murders were a part of the overall scheme of the robbery with the specific purpose to facilitate the robbers escape. The defendant had the three victims lie on the floor during the robbery and before leaving the bar shot each victim in turn with the intent that no witnesses be left to identify the robbers. The murders were not unexpected or accidental. *Cf. State v. Poland,* 132 Ariz. 269, 645 P.2d 784 (1982) (drowning Purolator guards after robbery); *State v. Gretzler, supra,* (defendants committed the murders "to obtain a substitute car in which they could continue their flight"); *State v. Tison,* 129 Ariz. 546, 633 P.2d 355 (1981); *cert. denied,* 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982) (homicides were committed to secure a vehicle in which assailants could continue their flight).

State v. Hensley, 142 Ariz. 598, 604, 691 P.2d 689, 695 (1984).

We have reviewed the entire record pursuant to A.R.S. § 13-4035 and have found no reversible error. The finding that the murders were committed in an "especially heinous, cruel or depraved manner" is reversed, but the finding as to the "pecuniary gain" aggravating circumstance is affirmed. No mitigating circumstances sufficiently substantial to call for leniency have been found.

The judgments and sentences are affirmed.

HOLOHAN, C.J., and HAYS, J., concur.

GORDON, Vice Chief Justice (concurring in part and dissenting in part):

For the reasons stated in *State v. Patrick Gene Poland*, —— Ariz. ——, 698 P.2d 183 (1985), I concur in affirming defendant's conviction but dissent from the reimposition of the death penalty.

FELDMAN, Justice:

I concur in Vice Chief Justice Gordon's special concurrence and dissent.

ORDER DENYING MOTION FOR RECONSIDERATION

SUPREME COURT
STATE OF ARIZONA
201 West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

May 8, 1985

RE: STATE vs. MICHAEL KENT POLAND
Supreme Court No. 4969-2
Yavapai County No. 8850

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 7, 1985, in regard to the above-referenced cause:

"ORDERED: Motion for Reconsideration—DENIED.

Justices Gordon and Feldman voting to grant."

Copy of Mandate (Order Affirming Judgment of Conviction and Sentence of Death) enclosed.

S. ALAN COOK, Clerk

TO: H. Kemp Wilhelmsen, Esq.
Hon. Robert K. Corbin, Attorney General—Attn: William J. Schafer III, Esq. and Gerald R. Grant, Esq.
Charles R. Hastings, Yavapai County Attorney
Michael Kent Poland

A.R.S. § 13-454 (DEATH PENALTY STATUTE)

13-454. Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree

A. WHEN A DEFENDANT IS FOUND GUILTY OF OR PLEADS GUILTY TO FIRST DEGREE MURDER, THE JUDGE WHO PRESIDED AT THE TRIAL OR BEFORE WHOM THE GUILTY PLEA WAS ENTERED SHALL CONDUCT A SEPARATE SENTENCING HEARING TO DETERMINE THE EXISTENCE OR NONEXISTENCE OF THE CIRCUMSTANCES SET FORTH IN SUBSECTION E AND F, FOR THE PURPOSE OF DETERMINING THE SENTENCE TO BE IMPOSED. THE HEARING SHALL BE CONDUCTED BEFORE THE COURT ALONE.

B. IN THE SENTENCING HEARING THE COURT SHALL DISCLOSE TO THE DEFENDANT OR HIS COUNSEL ALL MATERIAL CONTAINED IN ANY PRESENTENCE REPORT, IF ONE HAS BEEN PREPARED, EXCEPT SUCH MATERIAL AS THE COURT DETERMINES IS REQUIRED TO BE WITHHELD FOR THE PROTECTION OF HUMAN LIFE. ANY PRESENTENCE INFORMATION WITHHELD FROM THE DEFENDANT SHALL NOT BE CONSIDERED IN DETERMINING THE EXISTENCE OR NONEXISTENCE OF THE CIRCUMSTANCES SET FORTH IN SUBSECTION E OR F. ANY INFORMATION RELEVANT TO ANY OF THE MITIGATING CIRCUMSTANCES SET FORTH IN SUBSECTION F MAY BE PRESENTED BY EITHER THE PROSECUTION OR THE DEFENDANT. REGARDLESS OF ITS ADMISSIBILITY UNDER THE RULES GOVERNING ADMISSION OF EVIDENCE AT CRIMINAL TRIALS; BUT THE ADMISSIBILITY OF INFORMATION RELEVANT TO ANY OF THE AGGRAVATING CIRCUMSTANCES SET FORTH IN SUBSECTION E SHALL

BE GOVERNED BY THE RULES GOVERNING THE ADMISSION OF EVIDENCE AT CRIMINAL TRIALS. EVIDENCE ADMITTED AT THE TRIAL, RELATING TO SUCH AGGRAVATING OR MITIGATING CIRCUMSTANCES, SHALL BE CONSIDERED WITHOUT REINTRODUCING IT AT THE SENTENCING PROCEEDING. THE PROSECUTION AND THE DEFENDANT SHALL BE PERMITTED TO REBUT ANY INFORMATION RECEIVED AT THE HEARING, AND SHALL BE GIVEN FAIR OPPORTUNITY TO PRESENT ARGUMENT AS TO THE ADEQUACY OF THE INFORMATION TO ESTABLISH THE EXISTENCE OF ANY OF THE CIRCUMSTANCES SET FORTH IN SUBSECTIONS E AND F. THE BURDEN OF ESTABLISHING THE EXISTENCE OF ANY OF THE CIRCUMSTANCES SET FORTH IN SUBSECTION E IS ON THE PROSECUTION. THE BURDEN OF ESTABLISHING THE EXISTENCE OF THE CIRCUMSTANCES SET FORTH IN SUBSECTION F IS ON THE DEFENDANT.

C. THE COURT SHALL RETURN A SPECIAL VERDICT SETTING FORTH ITS FINDINGS AS TO THE EXISTENCE OR NONEXISTENCE OF EACH OF THE CIRCUMSTANCES SET FORTH IN SUBSECTION E AND AS TO THE EXISTENCE OR NONEXISTENCE OF EACH OF THE CIRCUMSTANCES IN SUBSECTION F.

D. IN DETERMINING WHETHER TO IMPOSE A SENTENCE OF DEATH OR LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE UNTIL THE DEFENDANT HAS SERVED TWENTY-FIVE CALENDAR YEARS, THE COURT SHALL TAKE INTO ACCOUNT THE AGGRAVATING AND MITIGATING CIRCUMSTANCES ENUMERTED IN SUBSECTIONS E AND F AND SHALL IMPOSE A SENTENCE OF DEATH IF THE COURT FINDS ONE OR MORE OF THE AGGRAVATING CIRCUMSTANCES ENUMER-

ATED IN SUBSECTION E AND THAT THERE ARE NO MITIGATING CIRCUMSTANCES SUFFICIENTLY SUBSTANTIAL TO CALL FOR LENIENCY.

E. AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED SHALL BE THE FOLLOWING:

1. THE DEFENDANT HAS BEEN CONVICTED OF ANOTHER OFFENSE IN THE UNITED STATES FOR WHICH UNDER ARIZONA LAW A SENTENCE OF LIFE IMPRISONMENT OR DEATH WAS IMPOSSIBLE.

2. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY IN THE UNITED STATES INVOLVING THE USE OR THREAT OR VIOLENCE ON ANOTHER PERSON.

3. IN THE COMMISSION OF THE OFFENSE THE DEFENDANT KNOWINGLY CREATED A GRAVE RISK OF DEATH TO ANOTHER PERSON OR PERSONS IN ADDITION TO THE VICTIM OF THE OFFENSE.

4. THE DEFENDANT PROCURED THE COMMISSION OF THE OFFENSE BY PAYMENT, OR PROMISE OF PAYMENT, OF ANYTHING OF PECUNIARY VALUE.

5. THE DEFENDANT COMMITTED THE OFFENSE AS CONSIDERATION FOR THE RECEIPT, OR IN EXPECTATION OF THE RECEIPT, OF ANYTHING OF PECUNIARY VALUE.

6. THE DEFENDANT COMMITTED THE OFFENSE IN AN ESPECIALLY HEINOUS, CRUEL, OR DEPRAVED MANNER.

F. MITIGATING CIRCUMSTANCES SHALL BE THE FOLLOWING:

1. HIS CAPACITY TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT OR TO CONFORM HIS

CONDUCT TO THE REQUIREMENTS OF LAW WAS SIGNIFICANTLY IMPAIRED, BUT NOT SO IMPAIRED AS TO CONSTITUTE A DEFENSE TO PROSECUTION.

2. HE WAS UNDER UNUSUAL AND SUBSTANTIAL DURESS, ALTHOUGH NOT SUCH DURESS AS TO CONSTITUTE A DEFENSE TO PROSECUTION.

3. HE WAS A PRINCIPAL, UNDER SECTION 13-452, ARIZONA REVISED STATUTES, IN THE OFFENSE, WHICH WAS COMMITTED BY ANOTHER, BUT HIS PARTICIPATION WAS RELATIVELY MINOR, ALTHOUGH NOT SO MINOR AS TO CONSTITUTE A DEFENSE TO PROSECUTION.

4. HE COULD NOT REASONABLY HAVE FORESEEN THAT HIS CONDUCT IN THE COURSE OF THE COMMISSION OF THE OFFENSE FOR WHICH HE WAS CONVICTED WOULD CAUSE, OR WOULD CREATE A GRAVE RISK OF CAUSING, DEATH TO ANOTHER PERSON.

SUPREME COURT OF THE UNITED STATES

No. 85-5023

PATRICK GENE POLAND, PETITIONER

v.

ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted, limited to Question 1 presented by the petition. This case is consolidated with 85-5024, *Michael Kent Poland* v. *Arizona*, and a total of one hour is allotted for oral argument.

October 7, 1985

SUPREME COURT OF THE UNITED STATES

No. 85-5024

MICHAEL KENT POLAND, PETITIONER

v.

ARIZONA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with case No. 85-5023, *Patrick Gene Poland* v. *Arizona*, and a total of one hour is allotted for oral argument.

October 7, 1985